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United Nations Commission on International Trade Law

Thirty-ninth session

Summary record (partial*) of the 821st meeting**
Held at Headquarters, New York, on Monday, 26 June 2006, at 10 a.m.

Temporary Chairman: Mr. Sekolec (Secretary of the Commission)
Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) .. (Mexico)

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* No summary record was prepared for the rest of the meeting.
** No summary records were prepared for the 811th to 820th meetings.

This record is subject to correction.

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Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

06-40835 (E)

The meeting was called to order at 10.10 a.m.

The discussion covered in the summary record began at 10.40 a.m.

Election of officers

1. **The Temporary Chairman**, noting that the Commission was meeting as a Committee of the Whole for the consideration of agenda item 5, invited members to elect a Chairman.

2. **Mr. Boulet** (Belgium) nominated Mr. Abascal Zamora (Mexico) for the office of Chairman.

3. *Mr. Abascal Zamora (Mexico) was elected Chairman of the Committee of the Whole by acclamation and took the Chair.*

Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
(A/CN.9/589, 592, 605, 606, 607 and 609 and Add.1-6)

Draft legislative provisions on interim measures and preliminary orders

Chapter IV bis. Interim measures and preliminary orders

Section 1. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

4. **The Chairman** drew attention to documents A/CN.9/605, 606 and 607, which contained the revised draft legislative provisions on interim measures, the form of arbitration agreement, and the draft declaration regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention, respectively, and to documents A/CN.9/609 and Add.1-6, which contained comments received from Member States and international organizations on the draft legislative provisions on interim measures. The Committee also had before it the reports on the forty-third and forty-fourth sessions of the Commission's Working Group II (Arbitration and Conciliation), which were contained in documents A/CN.9/589 and A/CN.9/592, respectively.

5. He invited the Committee to begin its consideration of article 17 of the draft legislative provisions on interim measures, contained in document A/CN.9/605 as draft chapter IV bis. Upon adoption, draft chapter IV bis would be annexed to the 1985 UNCITRAL Model Law on International Commercial Arbitration as a replacement for the current article 17.

6. **Mr. Graham Tapia** (Mexico) said that a degree of progress had been made on the matters before the Committee, reflecting a consensus reached by delegations at previous sessions of the Commission. The interim measures and the form of arbitration agreement were very important issues, which reflected current practice and were the result of an existing need among those who practised arbitration. The documents before the Committee should therefore provide a point of departure for the Committee's work, and the consensus achieved should be maintained.

7. **Mr. Sorieul** (International Trade Law Division) recalled that, in its present form, article 17, paragraph 1, partially reproduced the original article 17. However, Guatemala had suggested that the word "a" should be replaced by the word "any" in the phrase "at the request of a party".

8. **Mr. Castello** (United States of America) wondered whether the amendment suggested by Guatemala might imply the involvement of a third party. It should be made clear that the words "a party" in fact referred to "a party to the proceedings", and he would therefore prefer to retain the text as adopted by the Working Group.

9. **Ms. Kirby** (Observer for the International Chamber of Commerce) supported the comments of the representative of the United States.

10. **The Chairman** said he took it that the Committee wished to adopt article 17, paragraph 1, without amendment.

11. *It was so decided.*

12. **The Chairman** said that, as reflected in paragraph 6 of document A/CN.9/605, the Working Group had previously decided that, to the extent that all the purposes for interim measures were generically covered by the revised list contained in article 17, paragraph 2, the list of possible grounds for which an

interim measure might be granted could be expressed as an exhaustive one. The Working Group had further stated that the Commission might wish to note its decision in any explanatory material accompanying article 17, paragraph 2.

13. **Mr. Bellenger** (France) recalled his delegation's previously stated position that the measures set forth in article 17, paragraph 2 (b), should not be included in article 17. During the discussion in the Working Group, a number of delegations had raised the question of the principle involved in the measures set forth in article 17, paragraph 2 (b), which was detrimental to another, fundamental, principle, according to which a party should not be deprived of a jurisdictional remedy to which it was entitled. His delegation would therefore request that a comment be included in the report of the thirty-ninth session, to the effect that article 17, paragraph 2 (b), was a derogation from the rule.

14. **Mr. Möller** (Observer for Finland) said that his delegation also wished a note to be included in the Commission's report.

15. **The Chairman** recalled that the Working Group had engaged in a lengthy debate on article 17, paragraph 2 (b), but had decided to retain it. However, the comment of the representative of France would be included in the report on the Commission's thirty-ninth session. He took it that the Committee did not object to the text of paragraph 6 of document A/CN.9/605, and that it wished to adopt article 17, paragraph 2, without amendment.

16. *It was so decided.*

Article 17 bis. Conditions for granting interim measures

17. **The Chairman** invited the Committee to begin its consideration of article 17 bis of the draft legislative provisions.

18. **Mr. Graham Tapia** (Mexico) said that in article 17 bis, paragraph 1, the English words "shall satisfy" had been incorrectly rendered in Spanish as "deberá aportar". He trusted that it would be possible to amend the Spanish text during a future meeting of a drafting committee.

19. **Mr. Sorieul** (International Trade Law Division) said that it would not be possible to form a drafting committee to finalize the text, and he would therefore invite delegations to notify the Secretariat, in writing, of any translation problems.

20. **Mr. Li** Wenzhu (China) recalled that his delegation had suggested the deletion of article 17 bis, paragraph 1 (b), on the grounds that, since interim measures were generally of a very urgent nature, it made no sense to delay the procedure.

21. **Mr. Dervaird** (United Kingdom) said that it was a necessary safeguard, for the granting of interim measures, that there should be at least a degree of belief in the mind of the arbitral tribunal that there was merit in the claim being made by those seeking the interim measure. He would therefore consider that paragraph 1 (b) might be qualified by an expression such as "prima facie". The amended text of paragraph 1 (b) would thus begin: "Prima facie, there is a reasonable opportunity that ...".

22. **Ms. Kirby** (Observer for the International Chamber of Commerce) said that, while she endorsed in the main the previous speaker's comments, she could not support adding a prima facie standard to the level of proof that must be provided to satisfy an arbitral tribunal. The wording of paragraphs 1 (a) and 1 (b) was the product of considerable discussion in the Working Group. Moreover, there had been some debate as to whether or not there should be any qualification of the word "satisfy" in the chapeau of paragraph 1, and the Working Group had decided not to establish any standard in that regard. She was inclined to believe that the text should not be amended.

23. **Mr. Möller** (Observer for Finland) said that he, too, agreed with the substance of the comments made by the representative of the United Kingdom but would prefer not to add the words "prima facie".

24. **Mr. Graham Tapia** (Mexico) said that in paragraph 1 (a) the word "substantially" introduced an unnecessary requirement and should therefore be deleted. It was when the measure was being considered that one had all the necessary elements on hand for deciding whether or not to grant an award for damages. To include the additional burden of having to "substantially" outweigh the harm that was likely to result would be an unnecessary obstacle to the granting of the measure.

25. His delegation wished to raise a number of translation issues and would submit suggestions to the Secretariat, as requested by the representative of the International Trade Law Division.

26. **Mr. Uzelac** (Croatia) said that the Commission should adopt the text as drafted, since it was doubtful that the careful formulation of article 17 bis, paragraphs 1 (a) and (b), could be further improved, given the difficulty that the Working Group had had in reaching that formulation. While the difficulties of translating standards of proof and of aligning the various language versions of the text had been taken into consideration, it was practically impossible to achieve a simple, easily translatable formulation. In drafting the text, the Working Group had borne in mind that the concepts embodied in article 17 bis would in any case have to be brought into line with the relevant national laws of States who adopted the Arbitration Model Law; specifically, the provisions of article 17 bis would need to be adapted to the particular standards of proof established under those laws. Comments to that effect could be provided in the explanatory material, which was vital as an interpretative instrument that in future would enable the Commission to retrace the steps whereby it had reached the formulation of the new provisions and to offer guidance to those States that would be implementing them.

27. **The Chairman**, referring to the comment made by the observer for the International Chamber of Commerce regarding the chapeau of paragraph 1, recalled that the Working Group had deliberately chosen the words "shall satisfy" in order to avoid implying a burden of proof. It was important that that rationale should be noted in any explanatory material.

28. **Mr. Rodríguez** (Observer for the Federación Latinoamericana de Bancos) said that the use of the words "demanda" and "demandante" throughout the Spanish text of chapter IV bis was inconsistent with the corresponding English text. He therefore proposed that the word "demanda" be replaced with the word "requirimiento" or "petición" to correspond to the English "requirement" and "request", respectively, and that, accordingly, the word "demandante" be replaced with "requiriente" or "peticionante".

29. **The Chairman** said that all matters relating to the drafting and alignment of the various language versions should be submitted to the Secretariat in writing. The Spanish-speaking delegations should reach agreement on the matter raised by the observer for the Federación Latinoamericana de Bancos before making any proposal in that regard.

30. **Mr. López** (Chile) endorsed the proposal to delete the word "substantially" in paragraph 1 (a), since it significantly altered the meaning of the text to imply the imposition of an additional requirement that would need to be fulfilled in order for a request for an interim measure to succeed.

31. **Mr. Li** Wenzhu (China) endorsed the proposal by the representative of the United Kingdom relating to prima facie evidence as a viable alternative to the deletion of paragraph 1 (b). Drawing attention to the fact that there were some inconsistencies between the English and Chinese versions of the text, he expressed the hope that the translation of the text would be improved so as to ensure alignment of the various language versions.

32. **Mr. Komarov** (Russian Federation) said that the wording of article 17 bis should be retained in order to preserve the carefully balanced formulation achieved by the Working Group, particularly given the importance of the principle established in the chapeau of paragraph 1 and in paragraph 1 (a). In that regard, the word "substantially" was of fundamental importance, since, if it was deleted, the concept would be fundamentally altered.

33. **Ms. Kirby** (Observer for the International Chamber of Commerce) said that she did not support the proposal to delete the word "substantially" in paragraph 1 (a), nor did she accept the suggestion that the purpose of article 17 as drafted was to make it easier to obtain interim measures of protection. Rather, it was her understanding that the purpose was to clarify the circumstances under which interim measures might be granted, the types of interim measures that might be granted and the standards that an arbitral tribunal should employ when evaluating an application for such measures. Moreover, most legal systems set high standards for obtaining interim measures of protection and treated the granting of such measures as extraordinary. The text that the Working Group had developed through lengthy and extensive negotiations reflected those considerations.

34. **Mr. Castello** (United States of America) said that his delegation opposed both the deletion of paragraph 1 (b) and the alternative proposal to introduce the expression "prima facie", and in that regard it associated itself with the comments made by the observer for the International Chamber of Commerce. While he understood the concerns raised by the

delegations of the United Kingdom and China, the wording of article 17 bis reflected the extremely careful consideration of the Working Group in its attempt to balance the various concerns raised. The use of the words "shall satisfy" in the chapeau of paragraph 1 had been intended to avoid being too specific regarding any burden of proof and to leave it to the judgement of the tribunal to apply that framework sensibly. That was one of several reasons why it would be a mistake to introduce in paragraph 1 (b) the term "prima facie", which would probably have different connotations in different legal systems and would in any case add a new level of complexity and imply a burden of proof.

35. In that context, he recalled that the Working Group had agreed on the phrase "reasonable possibility" in paragraph 1 (b) in order to balance, on the one hand, the concern that the original wording might impose an excessive burden and oblige tribunals to prejudge the merits of the claim and, on the other, the undesirability of situations in which tribunals granted interim measures to a party when they did not believe that that party had at least a reasonable possibility of success on the merits of the claim.

36. Responding to the concern expressed by the Chinese delegation that fulfilment of the conditions established in paragraph 1 would delay proceedings, he recalled that section 1 had been drafted with an awareness of the prevailing practice in most legal systems, whereby courts routinely considered the likelihood of success on the merits of the claim when evaluating a request for an interim measure. It was widely understood that that judgement was preliminary and based on the evidence that had been established up to that point.

37. His delegation therefore favoured retaining article 17 bis as drafted and in general associated itself with the comments made by the representative of the Russian Federation and the observer for the International Chamber of Commerce.

38. **Mr. Schneider** (Observer for the Swiss Arbitration Association (ASA)) said that, while accepting the comment made by the observer for the International Chamber of Commerce that the purpose of the word "substantially" in paragraph 1 (a) was not to facilitate the granting of interim measures but rather to provide an adequate system for such measures, he considered that the word implied prejudgement of the outcome of the request. The criteria expressed in paragraph 1 (a) for assessing the balance of convenience were already established in arbitral practice, but the precise manner in which they were applied was something that should be left to arbitral practice to develop and resolve as appropriate. His delegation therefore proposed the deletion of the word "substantially".

39. Regarding paragraph 1 (b), his delegation understood the concern expressed by the Chinese delegation that it was difficult for an arbitral tribunal to base its determination on a possible outcome without prejudging that outcome. However, since many delegations had agreed that it was necessary for the tribunal to form an opinion that had at least a reasonable possibility of prevailing before it imposed on a party the burden of an interim measure, the condition established in paragraph 1 (b) should not be removed. Given the impossibility of further improving the way in which that condition was expressed, he supported paragraph 1 (b) as drafted.

40. **Mr. Graham Tapia** (Mexico) said that the second part of paragraph 1 (b), beginning with the words "provided that", appeared to establish a condition, whereas it was the understanding of his delegation that that was not the intended sense of the text. Rather, the Working Group had envisaged the second part of the paragraph as ensuring that the arbitral tribunal did not lose its decision-making power with respect to an interim measure. In order to clarify that point, he proposed that the two parts of paragraph 1 (b) should form two separate sentences, to read: "There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination."

41. **Mr. Martens** (Germany) expressed support for the wording proposed by the representative of Mexico and for the rationale given for that proposal.

The meeting was suspended at 11.45 a.m. and resumed at 12 noon.

42. **Ms. Kirby** (Observer for the International Chamber of Commerce) said that, while it was true that the inclusion of the word "substantially" in paragraph 1 (a) created an additional burden for the requesting party, the wording was sufficiently flexible to allow arbitral tribunals to reach a judgement in the context of

each particular case. The standards set out in that article also applied to preliminary orders and should therefore be retained.

43. **Mr. Castello** (United States of America) said that the proposal regarding paragraph 1 (b) made by the representative of Mexico, supported by the representative of Germany, was persuasive. He could agree to the deletion of the words "provided that" if it did not affect substantively the provisions agreed on in the Working Group but simply clarified their meaning.

44. **Mr. Schneider** (Observer for the Swiss Arbitration Association) likewise supported the Mexican proposal regarding paragraph 1 (b). As for the use of the word "substantially" in paragraph 1 (a), he did not think that the principle of an additional burden had ever been accepted, either in the Working Group or in the current assembly; hence, it could not be relied on. The party requesting an interim measure must convince the tribunal that harm would be caused if the measure was not ordered, and the respondent would then have the opportunity to show that there would be a burden. To say that the burden must substantially outweigh the harm that would otherwise result would be to introduce an undesirable element. He therefore urged the removal of the word "substantially".

45. **Mr. Bellenger** (France) said that he was in favour of the text of paragraph 1 (a) remaining unchanged.

46. **The Chairman** said that, if he heard no objection, he would take it that the text of paragraph 1 (a) should remain unchanged and that the Mexican proposal in respect of paragraph 1 (b) should be adopted.

47. *It was so decided.*

48. **The Chairman** drew attention to the question raised in paragraph 9 of document A/CN.9/605 as to whether it would be appropriate to provide guidance in explanatory material regarding the impact of urgency.

49. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that urgency should not be required in all situations. The need for urgency arose in regard to the preservation of evidence and also to cases where the object of the interim measure was to preserve the status quo. As a general requirement, urgency was not a suitable criterion.

50. **The Chairman** suggested that the Secretariat should expressly state in the explanatory material that the Working Group did not consider the need for urgency to be essential for the granting of an interim measure.

Section 2. Preliminary orders

Article 17 ter. Applications for preliminary orders and conditions for granting preliminary orders

51. **The Chairman** said that, as he took it that there was no objection to the wording of article 17 ter, paragraphs 1, 2 and 3, the article as a whole could be adopted in its current form.

52. *It was so decided.*

Article 17 quater. Specific regime for preliminary orders

53. **Mr. Dervaird** (United Kingdom) wondered what would happen under article 17 quater, paragraph 2, when there were several parties to an arbitration. He proposed that, since the other parties should also be given an opportunity to present their case, the words "or to any other party to the arbitration" should be inserted after the words "against whom a preliminary order is directed".

54. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that the only party concerned was the one against whom the preliminary order was directed. He suggested, as an alternative wording, "any party affected by a preliminary order".

55. **Ms. Kirby** (Observer for the International Chamber of Commerce) suggested that the word "or" in the insertion proposed by the representative of the United Kingdom should be replaced by "and".

56. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that, in order to guard against undue complication of the procedure, it might be wiser to say "the arbitrary tribunal shall give an opportunity to any party affected by a preliminary order to present its case", with each party having to justify how it was affected.

57. **The Chairman** said that the general rule in any arbitration was that all communications were addressed to all parties. In article 17 quater, the object of the special regime, where a communication was not addressed to all parties, was to guard against any measures that might frustrate action. Under the normal

arbitration regime, the communication was addressed to all parties and they all had the right to react.

58. **Mr. Castello** (United States of America) said it was clear from the wording of paragraph 1 that notice of the request for a preliminary order went to all the parties and that all the parties could be expected to have a chance to respond. Paragraph 2, however, made a special provision, under the safeguards regime, for the party against whom the order was directed to be able to present its case at the earliest practicable time. Any change to the wording would upset the careful balance achieved in the paragraph and go beyond the intention that lay behind it. He expressed the opinion that the paragraph should stand unchanged.

59. **Mr. Möller** (Observer for Finland) endorsed that view.

60. **Mr. Uzelac** (Croatia) said he agreed that the text should not be changed. In his opinion, the situation covered by article 17 quater did not constitute an exception to the rule that communications in arbitral proceedings should be directed to all the parties. In general, once a preliminary order had been issued, all the parties to the proceedings had the right to react, including the party against whom the order was directed. He supported the opinion that the paragraph constituted an additional safeguard, emphasizing the need for a swift reaction by the tribunal that had issued the order. Regarding the additional phrase suggested by the representative of the United Kingdom, he cautioned against any wording that could be interpreted as suggesting that the preliminary order should be addressed to persons that were not parties to the proceedings. His delegation preferred the wording proposed by the Swiss Arbitration Association. The Commission should consider the case of multiparty arbitration, bearing in mind that difficulties could ensue in cases where preliminary measures that could affect other respondents were directed against only one party.

61. **The Chairman** said that there was insufficient time to make further proposals. The best solution was to leave the text as it stood and to explain in the commentary that the object of the provision was to establish a safeguard.

62. **Mr. Markus** (Switzerland) said that his delegation was in favour of maintaining the current wording for reasons already given by other delegations. He agreed with the Chairman that an explanation should be provided in the commentary.

63. **Ms. Kirby** (Observer for the International Chamber of Commerce) supported the solution advocated by the Chairman. While under article 17 quater, paragraph 2, only the party against whom the preliminary order was directed would be invited to present its case, her understanding was that all the other parties would receive copies of that invitation and would have an opportunity to react even though not specifically invited to do so.

64. **Mr. Dervaird** (United Kingdom) said that the invitation to present its case should be addressed to every party to an arbitration. While it was doubtless correct to assume that parties would react whether or not they received an invitation, the contrast between "all parties" in paragraph 1 and the very specific "party against whom a preliminary order is directed" in paragraph 2 left doubt as to whether all the parties were entitled to present their cases to the arbitral tribunal. The same point arose in the last sentence of paragraph 4. The current wording could lead to a situation in which the only party that appeared to be able to present a case about the modification or withdrawal of an order was the party directly affected, which would seem to restrict the proceedings of an arbitral tribunal.

65. **Mr. Özsunay** (Turkey) supported the wording suggested by the observer for the Swiss Arbitration Association.

66. **Mr. Sharif** (Qatar) suggested that it might be desirable to provide for the right of the parties to object to preliminary orders and to be given time to acquaint themselves with the orders. To that end, the principle of a meeting between the adversary parties might usefully be provided for.

67. **Ms. Perales Viscasillas** (Spain) said that it was not necessary to amend paragraph 2, since the arbitral tribunal had to give the party against whom the preliminary order was directed the opportunity to present its case. That was an expression of the principle embodied in article 18 of the Arbitration Model Law, concerning equal treatment of parties. The goal of paragraph 2 was to emphasize that the party against whom the preliminary order had been directed should present its case at the earliest practicable time. Furthermore, the possibility for other affected parties to present their views was contemplated in paragraph 3, in which the reference to "any objection" included objections by third parties that could be affected

indirectly by the preliminary order. Other paragraphs in the article would require significant redrafting if reference to other parties was included in paragraph 2.

68. **Mr. Komarov** (Russian Federation) said that the preliminary order was of an exclusive nature and should not be subjected to rules that applied to ordinary orders. If provision was made for all parties to respond, the arbitral tribunal might then have to state its position on numerous statements and the process would become unduly long. The current wording of the paragraph incorporated the concept of the exclusive nature of the preliminary order and on that basis, the establishment of a special regime. It should therefore not be amended.

69. **Mr. Boulet** (Belgium) was in favour of maintaining the current text. It covered the questions that had been raised and gave priority to the party against which the preliminary order was directed, as was justified. The text did not exclude the right of other parties to object.

70. **The Chairman** said he took it that the Commission wished to maintain the text of paragraph 2 as it stood. The commentary should include a clarification to the effect that paragraph 2 was a safeguard that did not derogate from the general principle that communications in arbitration were addressed to all parties and that any party to the arbitration had the right to react.

71. *It was so decided.*

72. **Mr. Bellenger** (France) said that he had a reservation in regard to paragraph 5. There seemed to be no point in seeking a preliminary order if it could not be enforced by a court. He suggested that the second part or indeed the whole of the first sentence should be deleted.

73. **The Chairman** said that the principle that preliminary orders should not be subject to enforcement by a court was an essential part of the entire package of preliminary orders as agreed. If that sentence was deleted, it would impair the balance achieved by the Working Group, which had considered that preliminary orders were so short-lived that there would not be time for the courts to enforce them.

74. **Mr. Li Wenzhu** (China) said that it followed logically that if an order was binding it should be enforceable by a court. He was therefore in favour of the deletion of the second part of the first sentence.

75. **The Chairman** recalled the debate in the Working Group, which had concluded that to make a preliminary order enforceable by the courts would put out the wrong message; it had therefore made clear that such an order would be binding on the parties.

76. **Ms. Kirby** (Observer for the International Chamber of Commerce) said that any change to the wording of paragraph 5 would defeat the purpose of the Commission's work and she would therefore oppose it.

77. **Mr. Dervaird** (United Kingdom) said that, while paragraph 5 and section 4 concerning the recognition and enforcement of interim measures provided that a preliminary order should be binding on the parties, it was unclear from what point in time it should be binding. Given the provision in article 17 sexies that the arbitral tribunal could require that security be provided in connection with a preliminary order, it was necessary to clarify whether a preliminary order was binding before the security was in place or not.

78. **The Chairman** said that the arbitral tribunal could require security before, during or after the interim measure or preliminary order entered into force. It would therefore be possible for a preliminary order to be binding before security was given.

The meeting rose at 1 p.m.

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United Nations Commission on International Trade Law

Thirty-ninth session

Summary record of the 822nd meeting
Held at Headquarters, New York, on Monday, 26 June 2006, at 3 p.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... Mexico

Contents

Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*continued*)

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06-40847 (E)

The meeting was called to order at 3.10 p.m.

Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*continued*) (A/CN.9/589, 592, 605, 606, 607, 609 and Add.1-6)

Draft legislative provisions on interim measures and preliminary orders (*continued*)

Chapter VI bis. Interim measures and preliminary orders (*continued*)

Section 2. Preliminary orders (*continued*)

Article 17 quater. Specific regime for preliminary orders (*continued*)

1. **The Chairman** invited the Commission to resume discussion of article 17 quater, paragraph (4), of the draft legislative provisions on interim measures and preliminary orders contained in the note by the Secretariat on the settlement of commercial disputes: interim measures (A/CN.9/605). If he heard no objection, he would take it that the Commission wished to adopt draft article 17 quater, paragraph (4).

2. *It was so decided.*

3. **The Chairman** invited the Commission to resume its discussion of draft article 17 quater, paragraph (5).

4. **Mr. Sorieul** (International Trade Law Division) said that further clarification was needed on the proposal made by the Working Group and reflected in document A/CN.9/605, paragraph 16, to add the following text to paragraph (5) of article 17 quater: "a party shall not be prevented from seeking any relief in a court because it has obtained such a preliminary order from the arbitral tribunal". The text did not necessarily have to be incorporated in the article itself; rather, it might be included in accompanying explanatory material.

5. **Mr. Schneider** (Observer for the Swiss Arbitration Association) expressed reservations about stating the concept as a general principle, which would suggest that a party was free without restriction to resort to State courts for interim measures. A proviso should be added to the effect that, once an arbitral tribunal had been established, recourse to the tribunal should be given priority unless there were serious reasons not to do so. In accordance with the International Chamber of Commerce (ICC) rules of arbitration, after the appointment of a tribunal, recourse to State courts should be an exceptional measure. Therefore, the text should not be included in explanatory notes.

6. **Mr. Castello** (United States of America), referring to the statement by the observer for the Swiss Arbitration Association, said his delegation did not consider that there was a presumption or that the Working Group had favoured creating the presumption that, once a tribunal had been created under the Arbitration Model Law, there should then be a preference for seeking interim measures from the tribunal. While there was such a preference under ICC rules, his delegation's view was supported by a footnote to paragraph 16 of document A/CN.9/605 relating to paragraph 27 of the report of the Working Group on Arbitration and Conciliation on the work of its forty-fourth session (New York, 23-27 January 2006) (A/CN.9/592), which suggested that article 9 of the Arbitration Model Law already protected the right of a party to arbitral proceedings to request from a court an interim measure. His delegation understood that that remained a general principle under the Model Law.

7. It was unclear why the Working Group had not adopted the proposed text. It might be that there had been some concern about violating the res judicata principle. The explanation put forward by the observer for the Swiss Arbitration Association, however, would not be a basis for rejecting the proposal.

8. **The Chairman** said that, under article 9 of the Model Law on International Commercial Arbitration, it was not incompatible with an arbitration agreement for a party to request from a court an interim measure of protection and for a court to grant such a measure. When the Working Group had considered that point, it had decided that there was no need to make another change to the Model Law. As the proposal under discussion would modify article 9 of the Model Law, it had not been approved.

9. **Ms. Kirby** (Observer for the International Chamber of Commerce) said that her delegation associated itself with the statement by the representative of the United States of America. She saw no harm in

including the explanation given in paragraph 16 of document A/CN.9/605. If the explanation met the concerns raised by the observer of the Swiss Arbitration Association, she would suggest that the wording could be revised to read as follows: "A party shall not be prevented from seeking any relief it would otherwise be entitled to seek in a court merely because it has obtained such a preliminary order from the arbitral tribunal."

10. **Mr. Dervaird** (United Kingdom) said that he generally agreed with the comments made by the observer for the International Chamber of Commerce (ICC). He wished to emphasize, however, the importance of including a phrase such as was proposed in paragraph 16 of document A/CN.9/605 because, under article 17 quater, paragraph (5), a preliminary order was not subject to enforcement by a court. There might be a situation in which, in the absence of enforcement by a court, the person who had obtained the order was concerned that the unenforceable order would not be obeyed and that court assistance would be required. The inclusion of the explanation in paragraph 16 would be of assistance for that purpose.

11. **The Chairman** proposed that the wording suggested by the observer for ICC should be part of the explanatory material of the text.

12. **Mr. Slate II** (Observer for the American Arbitration Association) said that his delegation did not have any objection to the substance of the suggestion. The use of the word "merely", however, might tend to denigrate the role of the arbitral tribunal.

13. **The Chairman** said that the Secretariat would select the appropriate wording for the proposed explanatory material, taking into account the comments made. If he heard no objection, he would take it that the Commission wished to adopt article 17 quater, paragraph (5), of the draft legislative provisions on interim measures and preliminary orders contained in document A/CN.9/605 with a revised explanatory note as proposed by the observers for ICC and the American Arbitration Association.

14. *It was so decided.*

Article 17 quinquies. Modification, suspension, termination

15. **The Chairman** said that, if he heard no objection, he would take it that the Commission wished to adopt article 17 quinquies of the draft legislative provisions on interim measures and preliminary orders contained in document A/CN.9/605.

16. *It was so decided.*

Article 17 sexies. Provision of security

17. **The Chairman** invited the Commission to discuss draft article 17 sexies.

18. **Mr. Castello** (United States of America) said the Working Group had recognized that there were many variables that might arise between the point at which the tribunal made a decision on whether to grant a preliminary order and the point at which a party requesting the order might be able to assemble the necessary security ordered by the tribunal. The phrase "in connection with", in article 17 sexies, paragraphs (1) and (2), had been chosen intentionally to give the tribunal some flexibility. It might decide that, even though it might take days for the requesting party to assemble a letter of credit, an order should be granted immediately in the light of the urgency of a threat and the expectation that the party could and would assemble the necessary security. Imposing a blanket requirement that the security and the order should go in lock step did not allow for such flexibility. Therefore, his delegation would not favour any alteration in that regime.

19. **Mr. Rodríguez** (Observer for the Latin American Federation of Banks) asked, in connection with the possible requirement by the arbitral tribunal that the party requesting an interim measure should provide appropriate security in connection with the measure, whether the party might also request counter-security from the tribunal.

20. **The Chairman** said that all the articles established the requirements and conditions to be met for the issuance of an interim measure. That did not mean that the party affected by such a measure could not request the arbitral tribunal to waive the security. The Working Group had concluded that there was no need to state that explicitly.

21. **Mr. Sharif** (Qatar) said that there was a need to harmonize the wording in the two paragraphs of article 17 sexies. Paragraph (1) read, "The arbitral tribunal may require ...", whereas paragraph (2) read, "The arbitral tribunal shall require ...". The second paragraph could be deleted entirely or merged with the first paragraph, so that it would read as follows: "The arbitral tribunal may require the party requesting an

interim measure to provide appropriate security in connection with the measure unless the arbitral tribunal considers it inappropriate or unnecessary to do so." That would eliminate unnecessary repetition.

22. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that his delegation could approve the proposal to keep only paragraph 1. The Working Group had discussed the matter extensively, however, and had concluded that those who had reservations about preliminary orders required such a stringent provision. Therefore, his delegation continued to support the compromise, despite provisions with which it was not pleased.

23. **The Chairman** said that paragraph (1) used the word "may" because cases involving inter partes interim measures gave arbitral tribunals discretion as to whether security was required. As the second paragraph referred to ex parte preliminary orders, which entailed an obligation, the word "shall" was used. In the case of preliminary orders, the arbitrary tribunal must require the party to provide security unless the tribunal considered such a guarantee inappropriate or unnecessary.

24. If he heard no objection, he would take it that the Commission wished to adopt article 17 sexies of the draft legislative provisions on interim measures and preliminary orders contained in document A/CN.9/605.

25. *It was so decided.*

Article 17 septies. Disclosure

26. **The Chairman** invited the Commission to discuss draft article 17 septies.

27. **Mr. Graham Tapia** (Mexico) noted that the article had been inspired by article 18 of the Model Law on Cross-Border Insolvency, which established the obligation to disclose relevant information. While such an obligation was understandable in insolvency proceedings, the situation was quite different in the case of arbitral proceedings, which were adversarial in nature and in which the party wishing to present its case bore the burden of proof. There was no antecedent in arbitration procedures or commercial trials in which one party was responsible for disclosing evidence which would benefit the other party. The obligation of the party requesting an interim measure to disclose any material change in the circumstances on the basis of which the measure had been granted was contrary to that situation. In addition, there was no sanction for the party if it did not disclose the change in circumstances.

28. His delegation therefore proposed the deletion of paragraph (1) and of the second sentence of paragraph (2).

29. **Mr. Uzelac** (Croatia) said that his delegation was reluctant to accept the Mexican proposal. The text in article 17 septies had been drafted as a result of the process of separating the initial draft into several articles. There was a certain parallelism between all the articles in section 3, which dealt first with the standard for interim measures and then with the standard for preliminary orders. The original text should be retained.

30. **The Chairman** explained that the second paragraph of article 17 septies, which referred to preliminary orders, established the obligation of full and frank disclosure. Actually, that requirement might well have been included in article 17 quater, which dealt with the conditions for obtaining a preliminary order. The second paragraph of article 17 septies provided that the disclosure obligation of the requesting party would continue until the party against whom the order had been requested had had an opportunity to present its case. Once that happened, the disclosure obligation was transferred to the party against whom the order had been requested. What the Mexican delegation had objected to was the fact that the first paragraph required the party that had obtained the interim measure to do the work of the party against whom the measure was requested. The party against whom the measure had been requested would be aware of all the circumstances and at some point would discover that the circumstances giving rise to the request had changed. It was logical to assume that the party against whom the measure was requested would ask the arbitral tribunal to discontinue the measure in the light of the change in circumstances.

31. Paragraph (2) referred to ex parte preliminary orders. It began by providing that, when the party against whom an order had been requested had not had an opportunity to present its case, the requesting party had the obligation to inform it of any circumstances that might cause the party against whom the order had been requested to ask for the order to be refused. The second paragraph then went on to establish that the disclosure obligation remained until the affected party had had the opportunity to make its case. Thus, there was no parallelism in the articles in question.

32. **Ms. Kirby** (Observer for the International Chamber of Commerce) said that, during the Working Group's discussions on the disclosure principle embodied in article 17 septies, the divide between the civil-law and common-law systems had become apparent. The issue had been fully debated and resolved at that time. The party against whom a measure was directed would not necessarily know of changes in circumstances that were known to the party benefiting from the measure. It could happen, for example, that changes in the circumstances of the requesting party might make the measure moot, and that the opposing party might not be aware of those changes. It would not be fair to hypothesize that, in all circumstances, the party against whom the measure was directed would be in a position to raise the issue.

33. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that he was not sure whether the divide between common law and civil law had been bridged. The difference was a systemic one; there was also a feeling that it was not realistic to require the disclosure provision. Parties from the common-law world, where disclosure was an ingrained obligation which lawyers took very seriously, might even be at a disadvantage when faced with parties where such an obligation was not generally accepted. The Swiss delegation had proposed that the individual arbitral tribunal should decide on the matter. If the Commission decided to reopen the discussion, that proposal would be resubmitted.

34. **Mr. Rodríguez** (Observer for the Latin American Federation of Banks) endorsed the Mexican proposal. The first paragraph of the article placed the burden on the requesting party, and that was not acceptable. The arbitral tribunal should not be given the option to decide who should or should not provide evidence or information.

35. **Mr. Uzelac** (Croatia) said that he was not convinced that the issue was entirely one of common law versus civil law. Although there was no strong disclosure obligation in civil law, there were other principles that could have the same effect, such as the principle of fairness and cooperation in the process; in other words, the general principle was to act in good faith throughout the proceedings. Even when the other party had been given the opportunity to be heard, one should still assume that the party requesting the interim measures would have the obligation to disclose those facts that were either not known to the other party or would lead to a different decision by the arbitral tribunal. There could be situations in which certain material changes in circumstances were known only to the party that had requested the interim measures and in which, based on the assumption of cooperation, there should be a disclosure by that side. There could also be situations in which a party that had been given notice of interim measures had had the opportunity to be heard, but had not reacted. In such situations, especially where interim measures were concerned, it was important to be very cautious, and his delegation therefore felt that paragraph (1) in its present form should be maintained. The requesting party should not be relieved of the responsibility to disclose any material changes in circumstances simply because the other side had had a formal or material chance to be heard.

36. **Mr. Castello** (United States of America) said that his delegation was in favour of keeping the text that had been developed by the Working Group. It shared the doubt expressed as to whether the point that was the focus of paragraph (1) actually highlighted a divide between common-law and civil-law traditions. The paragraph referred to a situation in which a party requesting an interim measure had made a representation about a fact to the arbitral tribunal as a basis for obtaining the interim measure and had subsequently learned that the fact in question was not or was no longer true. The party that had considered it important enough to bring to the attention of the arbitrator ought to have the obligation to correct what had become a misstatement or a misapprehension of the facts. Perhaps in some legal traditions that was the obligation of the other party. However, that was not an unreasonable obligation to impose on counsel for one party. That was quite different from the focus of paragraph (2), which was that a counsel for one party had to put forward facts that were not in support of its position but nevertheless needed to do so because only one party was aware of them.

37. **The Chairman** said that a small group of delegations would work on a new wording of article 17 septies, paragraph (1), and submit it to the Commission.

Article 17 octies. Costs and damages

38. **The Chairman** said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 17 octies.

39. *It was so decided.*

Article 17 novies. Recognition and enforcement

Paragraph (1)

40. **Mr. Li** Wenzhu (China) said that the phrase "unless otherwise provided by the arbitral tribunal" should be deleted. It could lead to misunderstandings, since the arbitral tribunal itself would already have issued the measure.

41. **The Chairman** pointed out that, when the Working Group had discussed the matter, it had considered the possibility that the arbitral tribunal might grant an interim measure with the stipulation that the party concerned could not apply to the court. If he heard no objection, he would take it that the Commission wished to adopt draft article 17 novies, paragraph (1).

42. *It was so decided.*

Paragraph (2)

43. **The Chairman** said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 17 novies, paragraph (2).

44. *It was so decided.*

Paragraph (3)

45. **The Chairman** said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 17 novies, paragraph (3).

46. *It was so decided.*

47. *The meeting was suspended at 4.10 p.m. and resumed at 4.50 p.m.*

Article 17 decies. Grounds for refusing recognition or enforcement

Paragraph (1)

48. **Mr. Bellenger** (France) said that the wording was too complex, as it combined provisions based on article 36 of the Model Law on International Commercial Arbitration, which referred to arbitral awards, with provisions stemming more specifically from requirements concerning interim measures. The wording proposed by his delegation could be found in document A/CN.9/609/Add.5, footnote 2.

49. **The Chairman** pointed out that the alternative wording proposed by France had already been discussed by the Working Group.

50. **Mr. Uzelac** (Croatia) said that the French proposal addressed some of the remaining difficulties with the current proposal for article 17 decies. His delegation had previously voiced its concern regarding the present formulation; for one thing, the analogy with the recognition and enforcement of arbitral awards was not entirely appropriate. Although he understood the difficulty of reverting to the issue after it had already been discussed at length, he felt that the French proposal had merit and should be supported.

51. **Mr. Dervaird** (United Kingdom) sought clarification of the relationship, in the French proposal, between article 17 novies and article 17 decies, since paragraph (1) of the French text appeared to be similar to article 17 novies, paragraph (1), in document A/CN.9/605.

52. It was also unclear whether the grounds for refusing recognition/enforcement in article 17 decies, paragraphs (1) (a) (ii) and (iii), were to be removed or retained. If they were to be removed, his delegation would have strong reservations about changing the wording at the present time.

53. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that it was important to clarify the relationship between article 17 novies and decies before continuing the discussion of the French proposal.

54. **Mr. Komarov** (Russian Federation) said that his delegation shared the doubts expressed by the two previous speakers: discussion of the French wording would require reconsideration of the wording in article 17 novies. In general, his delegation was of the opinion that a new version of article 17 decies would not be justified, since the substance of that article was linked to other provisions of the draft.

55. **Mr. Uzelac** (Croatia) said that the French proposal clearly contained a compressed version of article 17 novies and a reworded version of article 17 decies. His delegation proposed that the original version of article 17 novies should be retained but that paragraph (2) of the French proposal should be used as a basis for the reformulation of article 17 decies. Specifically, the initial chapeau of article 17 decies paragraph (1) would read "Recognition or enforcement

of an interim measure may be refused only ...". That would be followed by paragraphs (2) (a) and (b) of the French proposal, starting at "if".

56. **Mr. Castello** (United States of America) said that, although it was easier to state each of the grounds for possible non-enforcement, the Working Group had decided on cross-references to paragraphs in article 36 because the grounds for non-enforcement of interim measures ought to be, to the extent possible, the same as the grounds for non-enforcement of final awards. The Working Group had recognized that there were distinct circumstances which applied only to interim measures; those had been covered, especially in paragraphs (1) (a) (ii) and (iii) of article 17 decies. The French proposal did not appear to take the distinct circumstances into account or to include the grounds contained in paragraphs (1) (a) (iii) and (iv) of article 36. Such omissions raised the concern that, in the effort to be more concise, the Commission might be introducing unintentional changes and distinctions. For that reason, his delegation was inclined to retain article 17 decies, as set forth in A/CN.9/605.

57. **Ms. Perales Viscasillas** (Spain) said that her delegation preferred to retain the text in its present form and recalled that the Commission had previously rejected a text similar to the one proposed by the French delegation because it had not reflected the degree of detail contained in document A/CN.9/605.

58. **Mr. Möller** (Observer for Finland) said that his delegation fully endorsed the statements by the representatives of the United States and Spain. It was of the opinion that the current text could not be improved and was therefore reluctant to reopen discussions on the subject.

59. **The Chairman** recalled that, although the Working Group had proposed a long text which reproduced the text of article 36, it had ultimately decided on a short text for article 17 novies and decies. It therefore seemed to him that the current objections had already been raised during the discussion on the aforementioned texts and that the Commission was repeating a previous debate.

60. **Mr. Graham Tapia** (Mexico) said that his delegation was in favour of retaining the text as it stood.

61. **Ms. Kirby** (Observer for the International Chamber of Commerce) said that her organization endorsed the comments made by the delegations of Spain, the United States and Mexico.

62. **The Chairman** said that the proposal put forward by the French delegation would not be retained and invited the Commission to resume its analysis of the text of article 17 decies.

63. **Mr. Schneider** (Observer for the Swiss Arbitration Association), supported by **Mr. Markus** (Switzerland), said, with respect to paragraph (1) of article 17 decies and the question of jurisdiction, that it would be useful to specify that, when examining jurisdiction at the level of enforcement of an interim measure, the applying judge should not make a full determination of jurisdiction but should be aware that the arbitral tribunal itself determined jurisdiction only on a prima facie basis. It was not necessary to change the wording of the clause itself but it would be helpful to flag the point in the explanatory notes to the text.

64. **The Chairman** said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 17 decies, paragraph (1) as set forth in document A/CN.9/605 and to include the comment by the observer for the Swiss Arbitration Association in the explanatory material.

65. *It was so decided.*

66. **The Chairman** said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 17 decies, paragraph (2), as set forth in document A/CN.9/605.

67. *It was so decided.*

Article 17 undecies. Court-ordered interim measures

68. **Mr. Graham Tapia** (Mexico) proposed a new version of article 17 undecies, which was more concise and included references to provisions contained in other articles on interim measures. The proposed version read as follows: "In accordance with article 17, paragraph (2), a competent court may issue interim measures in connection with arbitration proceedings which have a seat either within or outside its jurisdiction. For that purpose, the provisions contained in articles 17 bis, 17 quinquies, 17 sextius, 17 septius and 17 octies shall apply. The arbitral tribunal shall have exclusive powers to award costs and damages as provided in article 17 octies."

69. The explanatory material would contain the comment that the judicial tribunal would exercise its competence in accordance with its own rules and procedures insofar as those were relevant to the specific features of an international arbitration.

The meeting rose at 5.35 p.m.

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Thirty-ninth session

Summary record of the 823rd meeting
Held at Headquarters, New York, on Tuesday, 27 June 2006, at 10 a.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

Contents

Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*continued*)

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within one week of the date of this document* to the Chief, Official Records Editing Section, room DC2-750, 2 United Nations Plaza.

Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

06-40853 (E)

The meeting was called to order at 10.15 a.m.

The discussion covered in the summary record began at 10.40 a.m.

Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*continued*) (A/CN.9/589, 592, 605, 606, 607 and 609 and Add.1-6)

Draft legislative provisions on interim measures and preliminary orders (*continued*) (A/CN.9/605)

Chapter IV bis. Interim measures and preliminary orders (*continued*)

Section 5. Court-ordered interim measures (*continued*)

Article 17 undecies. Court-ordered interim measures (*continued*)

1. **The Chairman** invited the Commission to resume consideration of article 17 undecies.

2. **Mr. Castello** (United States of America) proposed replacing article 17 undecies with the following text: "A court shall have the same power of issuing interim measures in relation to arbitration proceedings as it has in relation to proceedings in the courts, including in cases where the place of the arbitration proceedings is in a country other than the court's. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration." Several delegations had worked on that proposal with the aim of conveying the same message as that contained in the current draft article but using clearer language. Unlike the text proposed by the representative of Mexico at the previous meeting, his proposal did not confer additional powers on the courts.

3. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said he understood that the rationale of the article was to ensure that a court's powers to order interim measures were not affected or diminished by the fact that arbitration proceedings were pending in the country or elsewhere or by the fact that interim measures had been ordered by an arbitral tribunal. Given that such situations had arisen in several countries, the objective of the article was to prevent the problems that had ensued. His delegation would therefore have preferred the following wording: "The powers of a court shall not be diminished by the fact that the dispute on the merits is submitted to arbitration and that an arbitral tribunal seized of that dispute has ordered interim measures." His delegation would, however, support the United States proposal provided that the explanatory material clarified that the provision did not extend the powers of courts in arbitration matters.

4. **Mr. Möller** (Observer for Finland) said that the Mexican proposal appeared to change the substance of the original article by extending the powers of the courts, which could contravene internal rules of civil procedure. The United States proposal was preferable as it did not differ in meaning from the original draft article 17 undecies. On the understanding that there was no intention to extend courts' current powers, his delegation would support the proposal.

5. **Mr. Uzelac** (Croatia) supported the wording proposed by the representative of the United States. The paragraph would, however, be more comprehensible if it was more appropriately placed in the Arbitration Model Law, for example in article 9, on arbitration agreement and interim measures by court.

6. **Ms. Kirby** (Observer for the International Chamber of Commerce) and **Mr. Özsunay** (Turkey) supported the United States proposal and said that the comments of the observer for the Swiss Arbitration Association should be reflected in the explanatory material.

7. **Mr. Boulet** (Belgium) said that, while his delegation supported the United States proposal, the words "including in cases where the place of the arbitration proceedings is in a country other than the court's" should be deleted. If the United States proposal was adopted, article 1, paragraph 2, of the Arbitration Model Law would require amendment to include article 17 undecies in the list of exceptions. The phrase he had cited from the United States proposal would therefore be superfluous, since the idea it conveyed would already be stated in the amended article 1, paragraph 2. Moreover, the list of exceptions in article 1, paragraph 2, included article 9, which specified that a party could address a State court to

request an interim measure but did not repeat the notion that that provision was applicable whether the place of arbitration was in a State territory or not. It was therefore inconsistent to include the phrase he had cited in article 19 undecies. His delegation endorsed the suggestion by the representative of Croatia to move article 17 undecies to article 9, paragraph 2, since the provisions that referred to interim measures ordered by a State jurisdiction would thus be grouped together.

8. **Mr. Dervaird** (United Kingdom) supported the United States proposal and endorsed the observations of the representative of Croatia.

9. **Mr. Bellenger** (France) said that his delegation favoured the wording proposed by the representative of the United States. The phrase "including in cases where the place of the arbitration proceedings is in a country other than the court's" should be maintained in order to encourage national judges to support national arbitration proceedings. Moreover, some of the wording proposed by the representative of Mexico, namely "a competent court may issue interim measures in connection with arbitration proceedings which have a seat either within or outside its jurisdiction", was useful in that connection.

10. **Mr. Komarov** (Russian Federation) supported the United States proposal. He also agreed that the article should be placed in article 9, paragraph 2, and that the comments of the observer for the Swiss Arbitration Association should be reflected in the explanatory material.

11. **Mr. Graham Tapia** (Mexico) withdrew the proposal on article 17 undecies that his delegation had made at the previous meeting.

12. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said it was important to clarify that the article under consideration regulated interim measures, not *juges d'appui*. Since the powers conferred in the article concerned interim measures, the judges involved were those responsible for issuing such measures. Care should be taken to ensure that that provision did not introduce the possibility of court officials the world over considering themselves to be *juges d'appui*.

13. **Mr. Li** Wenshu (China) said that his delegation supported the United States proposal.

14. **The Chairman** recalled that support had been shown for the suggestion of the representative of Croatia that the provision currently contained in article 17 undecies should become the second paragraph of article 9 of the Arbitration Model Law. There had also been some debate as to whether or not the reference to arbitration proceedings whose place was in a country other than the country of the court should be retained.

15. Furthermore, the representative of France and the observer for the Swiss Arbitration Association had raised the issue of the conflict between the *juge d'appui* and the judge issuing an interim measure. However, since the article very clearly referred to interim measures, that conflict did not arise. Moreover, the interplay between articles 5 and 6 of the Arbitration Model Law clearly established the powers and limitations of arbitration judges.

16. **Mr. López** (Chile) said that he supported both the proposal to make the provision currently included in the text as article 17 undecies a paragraph of article 9 of the Arbitration Model Law and the proposal to delete the repetitions in the text.

17. **Mr. Markus** (Switzerland) said that his delegation endorsed the United States proposal regarding article 17 undecies and the proposal to include the comments of the observer for the Swiss Arbitration Association in an explanatory note. Although he had no strong opinion, he would prefer to retain the reference to "a country other than the court's", for the sake of clarity. However, it might then prove necessary to amend the reference in article 1, paragraph 2, of the Arbitration Model Law, as proposed by the Belgian delegation. Since, in the present context, the Committee was not dealing with the question of the *juge d'appui*, the text proposed by the United States delegation should be retained.

18. With respect to the placement of the provision in article 17 undecies, he pointed out that article 9 was contained in chapter II, which dealt with the arbitration agreement itself. Moreover, article 9, unlike article 17, addressed the party to the arbitration agreement, not the arbitral tribunal. Article 17 in fact addressed the arbitral tribunal and its jurisdiction. His delegation did not have strong feelings about the placement of the provision currently contained in article 17 undecies, but would prefer to keep it where it was.

19. **Ms. Perales-Viscasillas** (Spain) endorsed the comments of the representative of Switzerland concerning the placement of the provision contained in article 17 undecies.

20. **Mr. Cosman** (Canada) said that his delegation supported the text proposed by the representative of the United States, without the further amendments proposed by other representatives. It also supported the inclusion of an explanatory note clarifying that the article should not be construed to extend the powers of the court to interference in international arbitration.

21. **Mr. Castello** (United States of America) said that his delegation wished to associate itself with the remarks made by the representatives of Switzerland and Spain on the question of the placement of article 17 undecies. From a structural standpoint, it might make more sense to keep the provision under a chapter heading referring to interim measures and preliminary orders, even though it might logically appear to belong in article 9.

22. **The Chairman** said that, if he heard no objection, he would take it that the Committee wished to adopt the text proposed by the United States delegation, to include the proposed clarifications in the explanatory material, and to leave the provision in its current place as article 17 undecies.

23. *It was so decided.*

Article 17 septies. Disclosure (*continued*)

24. **The Chairman** invited the Committee to resume its consideration of article 17 septies of the draft legislative provisions on interim measures and preliminary orders.

25. **Mr. Schneider** (Observer for the Swiss Arbitration Association) recalled that a number of delegations had been troubled by the provisions of article 17 septies and by its disclosure obligation, which was alien to some legislative systems. The best course of action would therefore be to find a compromise between the different approaches.

26. In view of the diverse situations that might form the basis of an application or order, it would be difficult to regulate the question generally. He would therefore propose that article 17 septies should be retained in its present form, but that the words "If so ordered by the arbitral tribunal", should be inserted at the beginning of paragraph (1).

27. Since the present wording did not make clear for the party concerned that the requirement was for notification of changes in the circumstances which were used as the basis for requesting the measure, perhaps some clarification would be needed. However, if it was provided that the tribunal must order the measure, then the particular circumstances of each case could be taken into account.

28. **Mr. Castello** (United States of America) said that his delegation did not object to the proposal of the Swiss Arbitration Association, which, by giving arbitral tribunals the same power as was contemplated in the existing text and allowing tribunals to tailor the provision to specific circumstances, seemed to answer the concerns of many delegations.

29. Because the language in article 17 septies seemed to be a little too broad, his delegation would propose that the words "or granted" should be deleted from the end of paragraph (1), and replaced with the words "if it becomes aware of such a change". The effect of that amendment would be to limit the obligation to the facts of which the party became aware.

30. The amended paragraph would therefore read: "If so ordered by the arbitral tribunal, the party requesting an interim measure shall promptly disclose any material change in the circumstances on the basis of which the measure was requested if it becomes aware of such a change."

31. Lastly, although Mexico had previously suggested that the duty to inform should be further restricted to the circumstance where only the party making the request was aware of the change in facts, he felt that such a solution would not be workable because its effects would be too cumbersome.

32. **Mr. Möller** (Observer for Finland) said that his delegation supported the addition of the words "If so ordered by the arbitral tribunal". However, he was not sure whether the addition of the words "if it becomes aware of such a change" was necessary, as their meaning appeared to be implicit in the existing text.

33. **Ms. Perales-Viscasillas** (Spain) said that her delegation agreed with the proposal to introduce the words "If so ordered by the arbitral tribunal", but also agreed with the observer for Finland that the meaning of the words "if it becomes aware of such a change" was implicit in the existing text. Moreover, the addition of those words might create uncertainty, which could give rise to problems in practice.

34. **The Chairman** said that a new proposal relating to paragraph (1) of article 17 septies had been put forward during informal consultations. He therefore

proposed that the Committee suspend its debate on article 17 septies to allow time for further consideration of the new proposal.

The meeting was suspended at 11.30 a.m. and resumed at 12.10 p.m.

Article 17 undecies (continued)

35. **Mr. Sorieul** (International Trade Law Division), referring to the proposal by the United States delegation, said that while the proposed formulation, by referring to a country other than that in which the court was located, would be appropriate in an article of an international convention, in the context of a model law it referred to a special jurisdictional case, since it was applicable within the borders of a State. He therefore suggested that in the text proposed by the United States delegation, the words "including in cases where the place of the arbitration proceedings is in a country other than the courts" be replaced with wording along the lines of "irrespective of whether the place of arbitration is in the territory of this State", based on article 1 (2) of the Arbitration Model Law, as set out in paragraph 23 of document A/CN.9/605.

36. The Chairman said that the wording suggested by the Secretariat was more in line with the language of model laws.

37. **Mr. Castello** (United States of America) said that the use of the words "irrespective of whether" as proposed by the Secretariat could imply that it did not matter whether or not the arbitration proceedings took place in another jurisdiction. It was his understanding that under article 17 undecies, a court would have no more power with respect to issuing interim measures for foreign arbitration proceedings than it did with respect to proceedings in a foreign court. By introducing the word "irrespective", the paragraph might be interpreted to mean that whatever power a court had to issue interim measures with respect to proceedings in its own courts would extend to any arbitration proceedings irrespective of whether those proceedings were domestic or foreign, which may not be the interpretation intended by the Working Group. Although his delegation had not had sufficient time to consider whether that was a serious concern, misinterpretation might be avoided altogether by retaining the words "including in cases where" and continuing with the words "the place of arbitration is in the territory of this State", as proposed by the Secretariat.

38. **Mr. Sorieul** (International Trade Law Division) said that the original formulation must be amended, since the paragraph referred to a State other than that in which the court was established and where national jurisdiction prevailed. The amendment now proposed by the representative of the United States would suggest the opposite of what the Commission intended to convey.

39. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said it was clear that the intent of the new formulation was to avoid the expansion of territorial competence, which was precisely the concern raised by the United States delegation. In principle, however, the new proposal was desirable, provided that those consequences could be avoided. He therefore proposed that the Committee discuss the possible implications of the new proposal in informal consultations.

40. **The Chairman** welcomed that suggestion.

41. **Ms. Perales Viscasillas** (Spain) drew attention to the fact that the words "*foro judicial*" appeared to have been introduced in the Spanish text of article 17 to refer to the court of a State, whereas the preceding articles used the word "*tribunal*" in accordance with the definitions set out in article 2 (c) of the Arbitration Model Law. It might be necessary to amend the Spanish text of those definitions to indicate that both "*tribunal*" and "*foro judicial*" meant a body of the judicial system of a State. The same issue might possibly arise in other language versions of the text.

Amendment to article 1, paragraph 2, of the Arbitration Model Law

Article 1

42. **The Chairman** invited the Commission to take up consideration of the amendment to article 1, paragraph 2, of the Arbitration Model Law proposed by the Working Group in paragraph 23 of document A/CN.9/605.

43. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that the inclusion in article 1, paragraph 2, of a reference to articles 17 novies and 17 decies was obviously necessary. However, it appeared that the inclusion of article 17

undecies would depend on the formulation that the Commission finally adopted for that article. He therefore proposed that a decision on the amendment be deferred until the Commission had finalized its discussion on article 17 undecies.

44. **The Chairman** expressed support for that suggestion. Since no further matters were pending in relation to document A/CN.9/605 on interim measures, he suggested that the Commission should suspend its meeting so as to hold informal consultations and finalize minor drafting details.

45. *It was so decided.*

The meeting rose at 12.30 p.m.

06-40853

United Nations A/CN.9/SR.824

General Assembly

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United Nations Commission on International Trade Law
Thirty-ninth session

Summary record of the 824th meeting
Held at Headquarters, New York, on Tuesday, 27 June 2006, at 3 p.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

Contents

Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*continued*)

This record is subject to correction.

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Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

06-40859 (E)

The meeting was called to order at 3.10 p.m.

Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*continued*) (A/CN.9/589, 592, 605, 606, 607 and 609 and Add.1-6)

Draft legislative provisions on interim measures and preliminary orders (*continued*)

Chapter IV bis. Interim measures and preliminary orders (*continued*)

Section 3. Provisions applicable to interim measures and preliminary orders (*continued*)

Article 17 septies. Disclosure (*continued*)

1. **The Chairman** invited the Commission to reopen discussion of article 17 septies, paragraphs 1 and 2, of the draft legislative provisions on interim measures and preliminary orders, set out in document A/CN.9/605 concerning settlement of commercial disputes.

2. **Ms. Kirby** (Observer for the International Chamber of Commerce (ICC)) said that the following amendments to article 17 septies had been agreed upon during informal consultations at the close of the previous meeting. Paragraph 1 would be amended to read: "The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which an interim measure was requested or granted". The last sentence of paragraph 2 would be amended to read: "Thereafter, paragraph 1 of this article shall apply".

3. Some participants had wanted to delete paragraph 1 altogether because they saw it as an overregulation of the arbitral process. But the Working Group had long since opted to give very detailed guidance, and she believed that the paragraph, which provided information that was not necessarily obvious to arbiters throughout the world, should be retained.

4. **Mr. Uzelac** (Croatia) said that, in principle, it was not a good practice to reopen discussion on provisions that had been adopted. Furthermore, many delegations liked the text as it stood, and the amendments just introduced, rather than improve the text as purported, would actually have the opposite effect. The wording of amended paragraph 1 might well lead to the conclusion that the requesting party had no obligation to disclose unless required to do so by a judge; whereas, in fact, there was an ongoing duty to disclose, in the interests of loyal cooperation and fairness of proceedings. It would be better to delete paragraph 1 than to embark on a redrafting that conveyed unintended meanings. The general provision originally adopted should not prove hard to apply under either civil or common law. His delegation would not support the amendments.

5. **The Chairman** explained that it had been decided exceptionally, to consider a new draft of article 17 septies in order to satisfy the concerns which had emerged during informal consultations that the text adopted at the previous meeting did not convey what the Working Group had in mind. The point was not to address possible problems arising from differences between the civil and common law systems.

6. **Mr. Graham Tapia** (Mexico) agreed with the representative of Croatia that the proposed wording created problems. Saying that the arbitral tribunal *might* require disclosure could actually have the effect of curtailing the broad powers given to the tribunal under the UNCITRAL Model Law on International Commercial Arbitration. He recalled that at the previous meeting his delegation had proposed a different solution: the deletion of paragraph 1 and of the last sentence of paragraph 2. If that proposal was not acceptable and if it was the consensus to accept the ICC variant, an explanatory note should be included, giving the Working Group's precise views on the scope of the requesting party's duty to disclose all material circumstances.

7. **Mr. López** (Chile) said that he supported the original deletions proposed by Mexico. No lawyer would voluntarily furnish information about changed circumstances, and it was up to the judge to require such information.

8. **Mr. Chan** (Singapore) said that if the Commission took the irregular step of reconsidering an adopted text, he would suggest retaining the original article 17 septies, and making the first sentence of paragraph 2 the first paragraph of the article, because it set out the general principle of the obligation to disclose all relevant circumstances, which could be termed a duty of utmost good faith.

9. To accept the ICC variant would mean that the party requesting an interim measure or applying for a preliminary order would have an obligation to disclose new circumstances only at the time the measure or order was granted, but not at a later stage; and that it was instead the duty of the arbitral tribunal to obtain disclosure of any material change in circumstances. Several questions then arose: could the arbitral tribunal issue continuing orders conditional upon disclosure of changes in material circumstances, and if so, was it the tribunal's duty to do so? If instead the tribunal could issue orders requiring disclosure of material changes only as and when deemed necessary, it was not clear how it would decide when to issue them. On balance, the ICC proposal raised more difficulties than it solved.

10. His delegation cautioned against deleting article 17 septies as a whole: clearly any interim order must be based on full disclosure and that had to be reflected in the text in order to maintain the credibility of the process, especially for users of the process.

11. **The Chairman** recalled that the Working Group had decided to restrict itself to the concept of full and frank disclosure *ex parte*, not *inter partes*.

12. **Mr. Komarov** (Russian Federation), said that he shared the misgivings voiced concerning the ICC proposal. The current text was a good compromise between various legal systems: it offered balanced solutions and allayed many doubts. The ICC text altered the meaning of the article produced by the Working Group.

13. **Mr. D'Allaire** (Canada) said that the ICC text was much narrower in scope than the current text in that it imposed a disclosure obligation on the requesting party only until such time as an order for an interim measure was granted, whereas the current text contained no such limiting factor.

14. Article 17 septies should be retained as adopted, although his delegation could also accept the proposal made at the close of the previous meeting that would have added wording at the beginning and the end of the article. It could not, however, accept the deletion of the words "or granted" as also proposed, because the text could then be read as applying only to the time of application. His delegation also had doubts about the Singaporean suggestion, because it was the first paragraph that set out the general principle with regard to interim measures, whereas the second paragraph covered the more restrictive matter of an application for a preliminary order.

15. **Ms. Perales Viscasillas** (Spain) said that the ICC proposal did indeed change the meaning of the text. That was not a problem, however, as the Commission was meeting to refine what had been decided earlier. Moreover, many delegations present had also participated in discussions on the text in the Working Group. Her delegation would therefore be in favour of the Mexican suggestion to delete the first paragraph and the last sentence of paragraph 2. As the article would thereby address preliminary orders exclusively, it should be placed in the section on preliminary orders. If that proposal was not acceptable to the Commission, the next option would be along the lines of the ICC proposal.

16. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that there was agreement that the first sentence of paragraph 2 should remain unchanged. His delegation would support maintaining the sentence as it was regardless of where it was placed. The debate concerned paragraph 1 and the last sentence of paragraph 2 regarding the disclosure obligation.

17. His Association took issue with the statements by some delegations that the text proposed by the Secretariat was a good compromise given that it introduced an obligation which was alien to, and would create discomfort for, many international arbitration practitioners. His delegation therefore fully supported the ICC proposal, which was a true compromise. Nevertheless, he understood the concerns expressed by the representatives of Mexico, Chile and Spain and could approve the Mexican proposal to delete paragraph 1 and the last sentence of paragraph 2 and the Spanish proposal to move the article to the section on preliminary orders.

18. **Mr. Markus** (Switzerland) said that his delegation was sympathetic to the concerns raised by the Croatian representative about reopening discussion on a text which had already been adopted. That should not prevent the Commission, however, from building on lessons learned. He noted that the provision had been drawn from the Model Law on Cross-Border Insolvency. The context of insolvency, however, was not comparable to the situation with respect to arbitration. His delegation would be inclined to follow the Mexican proposal to delete paragraph 1 and the last

sentence of paragraph 2, thereby excluding interim measures and dealing only with preliminary orders. If the proposal was not supported by the majority of the Commission, then his delegation would favour the proposal made by the observer for ICC, which was a further development of the proposal made at the previous meeting to include in paragraph 1 a provision that disclosure must be ordered by the arbitral tribunal. If the Mexican proposal to delete paragraph 1 was accepted, the information contained therein should be given in an explanatory note. Paragraph 1, however, was merely for information purposes and did not belong in the Model Law itself, which should contain only "hard" provisions.

19. **Mr. Möller** (Observer for Finland) said that his delegation agreed with the representatives of Croatia and the Russian Federation that it was inadvisable to reopen the discussion on questions which had already been decided. While he had earlier expressed approval of the words "if so ordered by the arbitral tribunal", it would suffice to add them in an explanatory note, as suggested by the representative of Switzerland. He therefore recommended moving paragraph 2, without the last sentence, to the section on preliminary orders. In addition, paragraph 1 should be deleted to avoid stating the obvious or initiating any contrary conclusions.

20. **Ms. Avenberg** (Sweden) said that her delegation was in favour of the Mexican proposal for the reasons put forward by the representative of Switzerland and the observer for Finland. If that proposal did not receive the necessary support, her delegation would favour the ICC proposal.

21. **Mr. Zhao** Jian (China) said that the text of the article should be retained in the interest of justice and fairness. The party requesting an interim measure had an obligation to disclose any material change in the circumstances on the basis of which the measure was granted. His delegation was guided by the principles of continental law and took issue with the ICC proposal, which would reduce the obligations incumbent upon a party requesting an interim measure.

22. **Mr. Castello** (United States of America) said that there were at least three positions under discussion, with a fair number of supporters for each of them. One was to retain the text contained in document A/CN.9/605. Another was to delete paragraph 1 entirely and the last sentence of paragraph 2. The other was to adopt some kind of compromise language, the latest version of which had been proposed by the observer for ICC. The point of that compromise was to retain some provision which would make clear that parties could be directed by the tribunal to disclose changes of circumstance in a way that accommodated some of the objections raised by delegations favouring the deletion of the article altogether. His delegation understood those objections to be based on a legal culture in which it was unnatural to impose an obligation upon parties to disclose facts which were not helpful to their position. It also understood that those delegations whose legal culture had that view would feel more comfortable if the arbitral tribunal was required to direct the disclosure rather than make disclosure an obligation of the requesting party.

23. His delegation was comfortable with the provision as it was drafted in document A/CN.9/605. It was important, however, to try to accommodate a serious objection from a number of delegations, even if it occurred at the last stage of the Commission's deliberations. The ICC proposal did accommodate that concern while meeting the concerns of other delegations which wished to retain the essence of the provision. His delegation was therefore inclined to support it.

24. **Mr. Dervaird** (United Kingdom) said that nearly all that he had wished to say had been stated by the United States representative. While his delegation sympathized with the approach taken by the Croatian and other delegations that draft article 17 septies should simply be retained in the form in which it had been presented, for the compelling reasons put forward by the United States representative, the solution propounded by the observer for ICC appeared to be a suitable compromise and contained the same type of empowerment provision as was found in draft article 17 quinquies and sexies. Even though the matters they dealt with fell within the competence of the arbitral tribunals, it was felt that they should be included in the statute for the benefit of those tribunals. The same applied to the draft article under consideration.

25. **Mr. Chan** (Singapore) said that the views expressed by the professional arbitrators regarding current arbitration practice deserved the greatest respect. The issue under discussion involved a confrontation between practicality and principle. With respect to practicality, it was unreasonable to expect a party requesting assistance from an arbitral tribunal to

provide information which would be to that party's disadvantage. With respect to principle, it did not seem right that a party which had obtained a benefit based on certain premises should have no obligation to inform the authority which had granted those benefits that the premises were no longer valid.

26. The Commission was drafting a model law which would be incorporated into the domestic law of many States. The rules formulated would have the force of law. The Commission would be giving to arbitral tribunals powers akin to those of a court of law. Arbitral tribunals and persons who sought their assistance must therefore comply with the standards which the law expected of courts. Whenever a benefit was sought from a court, there was an ongoing obligation to disclose relevant circumstances if for no other reason, as the representative of China pointed out, than respect for the basic principles of fairness. The same should apply when rules which were peculiar to arbitration practice were enacted as rules of domestic law. The drafters of the article under consideration had been sensitive to that consideration. His delegation would therefore support the text as it currently stood.

27. **The Chairman** said that the majority opinion appeared to favour the ICC wording, which could be adopted as a compromise, with clear information provided in the explanatory material. Differences between legal systems were often exaggerated at international meetings. The obligation not to withhold relevant information in bad faith existed in all legal systems, whether such an obligation was spelled out or not. The virtue of the ICC suggestion was that it offered a compromise solution covering the various concerns of delegations.

28. If he heard no objections, he would take it that the Commission wished to adopt draft article 17 septies, as amended along the lines suggested by the observer for ICC.

29. *It was so decided.*

Amendment to article 1, paragraph 2, of the Model Law on International Commercial Arbitration (continued)

30. **The Chairman** invited the Commission to resume its consideration of the amendment to article 1, paragraph 2, of the Model Law on International Commercial Arbitration as proposed by the Working Group in paragraph 23 of document A/CN.9/605.

31. **Mr. Castello** (United States of America) said that a decision on the language to be used for the amendment to article 1, paragraph 2, had been deferred, because the Commission had not yet finalized the wording of draft article 17 undecies. The results of the Commission's deliberation would not, however, alter the language in article 1, paragraph 2. His delegation would support the amendment proposed in paragraph 23 as it stood, including the reference to article 17 undecies.

Draft legislative provisions on interim measures and preliminary orders (continued)

Chapter IV bis. Interim measures and preliminary orders (continued)

Article 17 undecies. Court-ordered interim measures (continued)

32. **The Chairman** invited the Commission to resume discussion of article 17 undecies.

33. **Mr. Castello** (United States of America) proposed a revision of the handwritten version of article 17 undecies, discussed at the previous meeting (A/CN.9/SR.823), which began: "A court shall have the same power of issuing interim measures in relation to arbitration proceedings as it has in relation to proceedings in the courts ..." He proposed that after the words "arbitration proceedings", the following phrase should be inserted: "irrespective of whether their place is in the territory of this State". Also, the word "the" should be deleted before the word "courts", and the phrase "including in cases where the place of the arbitration proceeding is in a country other than the court's" should be deleted.

34. The amended paragraph in full would read:

> "The court shall have the same power of issuing interim measures in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration".

35. The changes he was suggesting would minimize any risk that the language, especially the word "irrespective", would be viewed as expanding the jurisdiction that national courts would already have in a given system to act with respect to proceedings

abroad. The same purpose would be served by taking out the word "the" before "courts" because "the courts" might commonly be understood as the court system in which a court sat, whereas deleting the word "the" would indicate proceedings generally in courts whether they were domestic or abroad.

36. **Mr. Chan** (Singapore) asked for clarification as to the exact scope of the wording proposed by the United States representative. Did it mean that a court in one country could exercise jurisdiction over arbitration proceedings that were taking place in another country?

37. **The Chairman** said that his understanding of what the Working Group and the Committee had decided was that the court of a given country could not exercise jurisdiction over arbitral proceedings taking place in another country but that it could issue interim measures relating to arbitration proceedings conducted in another country.

38. If he heard no objection, he would take it that the Commission agreed to adopt the text proposed by the United States.

39. *It was so decided.*

Amendment to article 1, paragraph 2, of the Arbitration Model Law (continued)

40. **The Chairman** invited the Commission to resume its consideration of the amendment to article 1, paragraph 2, of the Arbitration Model Law as proposed by the Working Group in paragraph 23 of document A/CN.9/605.

41. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that the wording adopted for article 17 undecies satisfied his Association, which was now prepared to accept the inclusion of a reference to article 17 undecies in article 1, paragraph 2.

42. **The Chairman** said that, if he heard no objection, he would take it that the Commission agreed to adopt the revised text of article 1, paragraph 2, proposed by the Secretariat.

43. *It was so decided.*

The meeting was suspended at 4.35 and resumed at 5.10 p.m.

Draft legislative provisions on the form of arbitration agreement (continued)

Revised draft article 7 of the Arbitration Model Law (continued)

44. **The Chairman** invited the Committee to consider the revisions to article 7 proposed by the Working Group in document A/CN.9/606, including the alternative proposal.

Paragraph 1

45. **Mr. Graham Tapia** (Mexico) proposed that the last sentence of paragraph 1 should be deleted because it was unnecessary and contributed nothing to the text. A country that had the Model Law would not need that provision, which had originally been intended to allow flexibility in countries that accorded different treatment to arbitration agreements that were included in the contract to which they referred and arbitration agreements that were signed subsequent to the contract.

46. **The Chairman** recalled that at its January session, the Working Group had considered the alternative proposal for paragraph 1, which was identical to the Mexican text. The idea was to use parallel wording for paragraph 1 in the main proposal and the alternative proposal.

47. **Mr. Castello** (United States of America) said it was his understanding that the alternative proposal was a text that been proposed by the Mexican delegation in the Working Group. It was not his understanding, however, that the Working Group had intended to make the main proposal parallel to the Mexican text. It might be, as the representative of Mexico had claimed, that deleting the second sentence of paragraph 1 in the main proposal for article 7 would ultimately not have any consequence, but it was language which was probably familiar to everyone. It was his understanding that the general rule in the Committee's proceedings was that if a text had been reviewed repeatedly and adopted in the Working Group, it would take more than one delegation's proposal to change it.

48. **The Chairman** said that since the change proposed by the representative of Mexico had nothing to do with the problem of the written form, but rather was an updating of the first paragraph, he had thought that there would not be any objection to it. However, in view of the reservation expressed by the United States, he suggested that the Working Group's version of paragraph 1 should be retained.

49. **Mr. Boulet** (Belgium) said that his delegation supported the position of the United States delegation. He saw no reason to change the text proposed by the Working Group, which was the same as the current text of the Model Law. Paragraph 1 had been discussed at length by the Working Group; it was a text that had existed for a long time, and should be retained. In its written comments (A/CN.9/609/Add.3), his Government had already expressed its reservations about the fact that the Working Group had submitted two different proposals for article 7.

50. **The Chairman** suggested that, in order to avoid confusion, the Commission should not discuss the alternative proposal yet. If he heard no objection, he would take it that the Commission wished to retain the text proposed by the Working Group for article 7, paragraph 1.

51. *It was so decided.*

Paragraph 2

52. **The Chairman** invited members to consider paragraph 2 of article 7. If he heard no objection, he would take it that the Commission wished to adopt the text of paragraph 2 proposed by the Working Group in document A/CN.9/606.

53. *It was so decided.*

Paragraph 3

54. **The Chairman** invited members to consider the Working Group's proposal for paragraph 3 of article 7.

55. **Mr. Bellenger** (France) proposed that the following phrase should be added at the beginning of paragraph 3: "Sans préjudice du consentement donné au contrat ou à la convention d'arbitrage,".

56. **Ms. Rodríguez Pineda** (Guatemala) read out an alternative proposal for paragraph 3 which her delegation had submitted in writing in document A/CN.9/609. The proposal consisted of adding the words "if there exists any record or documentary evidence of its contents" after the word "writing" in the first line, and replacing the words "by conduct" with "through the execution of certain legal documents". Thus, the new paragraph would read:

> "An arbitration agreement shall be in writing if there exists any record or documentary evidence of its contents, regardless of whether the agreement or the contract of which it was a part was concluded orally, through the execution of certain legal documents or by some other means".

57. **Ms. Wermter** (Germany) said that, because paragraph 3 implied that an oral agreement was equivalent to a written agreement, the text should be revised to indicate that the written form requirement set forth in paragraph 2 was met if the content of the agreement was recorded in any form.

58. **Mr. Sorieul** (International Trade Law Division) said that the commentary to paragraph 3 should explain that the new wording had eliminated one of the functions formally fulfilled by article 7, which was to provide evidence not only of the contents of the agreement but also of the consent by the parties to the arbitration agreement. However, in order to avoid giving the impression that parties might be involved in an arbitration agreement to which they had not consented, the commentary should also explain that the question of consent would be covered by the applicable contract laws in the countries concerned. In other words, the new version of paragraph 3 was neutral and could not be used to validate a unilateral contract or act which would compel a person to be a party to arbitration proceedings against his or her will.

59. **The Chairman** recalled that, at the previous session, the Working Group had concluded that it was the content of the arbitration agreement that needed to be put in writing rather than the consent to arbitration. He agreed with the representative of the International Trade Law Division that the explanatory material should provide an explanation of that decision.

60. **Mr. Uzelac** (Croatia) said that there was no room for improvement of the text of paragraph 3. However, the background material should be comprehensive and should include an outline of the issues and questions that the Working Group had had to consider.

61. **Mr. Castello** (United States of America) endorsed the view that the background material should explain that the requirements for consent would be covered by national legislation.

62. **Mr. Sorieul** (International Trade Law Division) drew the Commission's attention to the last sentence of paragraph 9 of the general remarks on paragraph 3 and pointed out that it referred back to discussions covered in paragraph 27 of document A/CN.9/508, as well as discussions that had taken place at the thirty-fourth

session in 2001. The case covered in the sentence also corresponded to the situation described in paragraph 12 (d) of document A/CN.9/606. He wished to ensure that the last sentence of paragraph 9 was agreeable to the Commission and suggested that it could be included in a commentary to the text.

63. **Mr. Boulet** (Belgium) said that it was almost impossible to separate the idea of a document that gave evidence of the content of an agreement and a document that gave evidence of some sort of initial agreement. If content was established in a document, that same document should provide some initial evidence that the content had been the subject of an agreement or, at least, that the content emanated from one of the parties. If the elements of content and consent were completely separated, the document envisaged in paragraph 3 would be an external document, with no connection whatsoever to the parties.

64. **Mr. Sorieul** (International Trade Law Commission) said that paragraph 3 was designed to be ambiguous and that the wording satisfied both those who wished the written form to emanate from the parties and those who did not. He was therefore of the opinion that the text should be maintained in its present form. The explanatory material should mention that general law on consent continued to be applicable and should provide several examples of cases which were not intended to be addressed by that paragraph.

The meeting rose at 6 p.m.

United Nations A/CN.9/SR.825

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United Nations Commission on International Trade Law

Thirty-ninth session

Summary record of the 825th meeting
Held at Headquarters, New York, on Wednesday, 28 June 2006, at 10 a.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

Contents

Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*continued*)

Statement by the Under-Secretary-General for Legal Affairs, The Legal Counsel

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Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

06-40883 (E)

The meeting was called to order at 10.15 a.m.

Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*continued*) (A/CN.9/589, 592, 605, 606 and 609 and Add.1-6)

Draft legislative provisions on the form of arbitration agreement (*continued*) (A/CN.9/606)

Revised draft article 7 of the Arbitration Model Law (*continued*)

1. **The Chairman** invited the Commission to resume its consideration of paragraph 3 of revised draft article 7.

2. **Ms. Mas y Rubí Spósito** (Venezuela) said that the wording of paragraph 3 was ambiguous. Read in conjunction with paragraphs 1 and 2, it implied that there could be an exception to the condition of a written agreement; it could be taken to admit the possibility of an oral agreement. She proposed the following alternative wording: "An arbitration agreement or contract may be concluded orally, by conduct or by other reliable means of proof that manifests the will of the parties".

3. **The Chairman** stressed that the wording had already been considered at length and that there remained little time for further discussion of the matter.

4. **Mr. Boulet** (Belgium) said that, while the wording was indeed ambiguous, Belgium could accept it. He suggested that any confusion could be dispelled in the explanatory material.

5. **Mr. Sandoval López** (Chile) said that the fact of a provision having been discussed at length in the Working Group did not mean that it should be automatically approved by the Commission. The wording proposed by the representative of Venezuela clarified an otherwise confusing text. It would be difficult to submit draft article 7 to his legislature in its current form.

6. **The Chairman** acknowledged that the Commission could discuss and change any of the draft provisions. In seeking to wind up the discussion on paragraph 3, he had been guided by practical rather than legal considerations. He recalled the position taken by Mexico, which was to omit the writing requirement since it was not accepted by everyone. That was the reasoning behind the alternative proposal for draft article 7.

7. **Mr. Komarov** (Russian Federation) said that the wording proposed was a compromise which, by definition, could not wholly satisfy any of the parties. He emphasized that the text under discussion was a draft model law and that, as such, it could not be expected to fit seamlessly into all national legislative systems.

8. **The Chairman** said that, if he heard no objection, he would take it that the Commission wished to adopt paragraph 3 in its current form, it being understood that an explanation would be provided in the explanatory material.

9. *It was so decided.*

10. **The Chairman** invited the Commission to consider paragraph 4 of revised draft article 7.

11. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that, since paragraph 3 provided for "other means" of concluding a contract, paragraph 4 was an unnecessary expansion and could well be deleted in its entirety.

12. **Ms. Hwee Lian** (Singapore) asked how paragraphs 3 and 4 fitted together. It was not clear whether paragraph 4 applied to the agreement itself or to the record of its content; furthermore, the recognition of electronic records should also apply to paragraph 5. The use of the term "electronic communication" in paragraph 4 presupposed communication between the parties, and there was no such communication in the case of a record of contents. The wording should accordingly be modified.

13. **The Chairman**, retracing the history of paragraph 4, said that, in 1985, article 7 of the model law had recognized the possibility of an arbitration agreement in electronic form. In including the stipulation that the writing requirement was met by an electronic communication, the Working Group had sought to follow the UNCITRAL Model Law on Electronic Commerce. However, at its most recent meeting, it had couched that same provision language compatible with the 2005 Convention on the Use of Electronic Communications in International Contracts.

14. **Mr. Markus** (Switzerland) said that paragraph 4 overregulated the issue that the Commission was seeking to address. In trying to tally with the two aforementioned Conventions by circumscribing what was meant by "in writing", the Working Group had perhaps gone too far. He was puzzled by the wording. It defined what counted as being in writing, but paragraph 3 specified that an agreement in writing depended on its content being recorded in any form.

15. **Ms. Perales Viscasillas** (Spain) said that she agreed with the representative of Switzerland and the observer for the International Arbitration Association but did not think that the mention of electronic communication should be omitted. Electronic media had become an important reality and had to be taken into account. She suggested the addition at the end of paragraph 3 of the words ", including electronic communication" and the inclusion in the explanatory material of a reference to the 2005 Convention. She would then be in favour of the deletion of paragraph 4.

16. **The Chairman** said that there was a danger of too much reliance being placed on the explanatory material.

17. **Mr. Castello** (United States of America) recalled that, in the Working Group discussion, it had been recognized that paragraph 4 was very wordy and the possibility of cutting it down or removing it altogether had indeed been considered. However, it had been strongly felt that a modernized version of the model law had to take electronic communication into account, and in particular the relevant work already done within the United Nations. The language used had accordingly been harmonized with that used in the 2005 Convention on the Use of Electronic Communications in International Contracts. It would therefore be a mistake to delete or amend that paragraph, which built on the work of experts in the field.

18. **Mr. Boulet** (Belgium), supported by the representative of Germany, endorsed the remarks made by the representative of the United States. Arbitration agreements and electronic commerce were two separate issues and it would not be appropriate to mix them. The aim of paragraph 4 was limited to giving a technical definition of writing, while the aim of paragraph 3 was broader in that it sought to offer a more flexible definition of arbitration agreements. Paragraph 4 linked up usefully with the 2005 Convention and should therefore be retained.

19. **Ms. Mas y Rubí Spósito** (Venezuela) supported the views expressed by the representative of Switzerland. She saw no point in including definitions of "electronic communication" and "data message" in paragraph 4, as they could perfectly well find a place in other instruments.

20. **Mr. Uzelac** (Croatia) agreed with the representative of the United States but wondered whether a better formulation might not be found. He likewise questioned the appropriateness of the definitions given in the paragraph. He suggested that the paragraph should end after the words "useable for subsequent reference" and that the remainder should go into a note.

21. **The Chairman** said that notes in model laws were not generally intended for publication. Notes provided guidance for legislators and were not legally binding.

22. **Mr. Özsunay** (Turkey), supported by **Mr. Lefebvre** (Canada), said that paragraph 4 should be adopted in its entirety since it contained all the information that lawyers and business people would require to understand the question of how electronic communication could fulfil the written form requirement.

23. **Ms. Avenberg** (Sweden) agreed with the observer for the Swiss Arbitration Association that the content of paragraph 4 had already been covered in article 7, paragraph 3.

24. **Mr. Sandoval López** (Chile) favoured the retention of paragraph 4, since experience in his country had indicated that such references were useful for policymakers and legislators.

25. **Mr. Dervaird** (United Kingdom) associated himself with the comments made by the representatives of the United States and Germany and endorsed the view that readers of the provision should not have to consult other documents in order to understand the Model Law.

26. **Mr. Bellenger** (France) said that his delegation supported maintaining paragraph 4 in a modified form. The second part, beginning with the words "electronic communication", should be deleted, and readers should be referred to other instruments adopted by the Commission for the information it currently contained.

27. **Mr. Möller** (Observer for Finland) said that, while he supported the alternative proposal, if the article under consideration was maintained, paragraph 4 should remain in its current form.

28. **The Chairman** said he took it that the Commission wished to adopt article 7, paragraph 4.

29. *It was so decided.*

30. **The Chairman** invited the Commission to consider paragraph 5 of revised draft article 7.

31. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that, while paragraph 5 derived from article 7, paragraph 2, of the Arbitration Model Law, it contemplated a situation that, in his experience, had never arisen. When the paragraph had first been drafted, the form requirements had been more restrictive than those currently in place. Since article 7, paragraph 3, included reference to an agreement "recorded in any form", paragraph 5 was redundant and should be deleted.

32. **Mr. Özsunay** (Turkey) said that paragraph 5 should be adopted as it appeared in the draft because it came from article 7, paragraph 2, of the Model Law.

33. **Mr. Castello** (United States of America) said that his delegation agreed with the representative of Turkey. While an exchange of statements of claim and defence could fall within the broader category of article 7, paragraph 3, the Working Group had considered it prudent to retain paragraph 5 to ensure that no negative implications were drawn from deletion of the paragraph.

34. **Mr. Möller** (Observer for Finland) said that, on balance, his delegation supported maintaining paragraph 5.

35. **Mr. Komarov** (Russian Federation) said that paragraph 5 should remain unchanged. His delegation had seen several cases in which it had been applicable, and deleting it could create a degree of uncertainty about whether an exchange of statements continued to constitute a written arbitration agreement.

36. **Mr. Markus** (Switzerland) said that, while his delegation saw reasons for deleting the paragraph, the arguments for maintaining it were also compelling. At the very least, the word "Furthermore" should be deleted, since the paragraph provided clarification but no additional substance.

37. **The Chairman** said that some uniform terminology should be found to refer to written arbitration agreements throughout the article.

38. **Mr. Graham Tapia** (Mexico) said that his delegation supported maintaining the paragraph, subject to the editorial change the Chairman had suggested. In his experience, paragraph 5 had proved useful in several circumstances.

39. **The Chairman** said he took it that the Commission wished to adopt paragraph 5.

40. *It was so decided.*

41. **The Chairman** invited the Commission to consider paragraph 6 of revised draft article 7.

42. **Mr. Özsunay** (Turkey) said that since paragraph 6 had also been taken from article 7, paragraph 2, of the Arbitration Model Law, it should be adopted as it appeared in the draft. Moreover, the paragraph had been included in several national laws on international arbitration that were based on the Model Law.

43. **The Chairman** said he took it that the Commission wished to adopt paragraph 6.

44. *It was so decided.*

45. **The Chairman** invited the Commission to consider the alternative proposal for article 7 on the definition of arbitration agreement. Given the lack of consensus on article 7 in the Working Group, it had been proposed that the Commission should submit both the revised draft article and the alternative proposal to States.

46. **Mr. Sekolec** (Secretary of the Commission) said that, in accordance with the Commission's practice, the two texts would be entitled "Variant 1" and "Variant 2". The explanatory material would indicate the reasons for providing two options and clarify that one or the other should be adopted.

47. **Mr. Markus** (Switzerland) said that his delegation favoured the alternative proposal, since it contained no form requirement. However, the alternative proposal provided no definition of the scope and content of the arbitration clause. Since such clauses usually specified elements such as the arbitration institution, the relevant legislation, the composition of the tribunal, its seat and the language of the proceedings, that lack of definition could cause problems. Variant 1 of article 7 also had the advantage

that it provided a modern interpretation of article 2 of the 1958 New York Convention.

48. **Mr. Möller** (Observer for Finland) said that he supported the alternative proposal because it was fully compatible with the New York Convention. Both variants should be kept, however, because national legislators should be given both alternatives.

49. **Ms. Avenberg** (Sweden) said that the lack of a writing requirement had not created any problems in her country. Agreements were written in practice but, because there was no writing requirement, there were no disputes as to whether or not stipulated requirements had been fulfilled. Moreover, provisions such as those included in the first variant were not part of the Swedish legal tradition. Her delegation therefore supported the alternative proposal, and felt that both variants should be retained in the Arbitration Model Law. As noted by the observer for Finland, to do so would be consistent with the New York Convention.

50. **Mr. Martens** (Germany) said that his delegation also supported the alternative proposal. The Commission had spent a number of years trying to bring the article into line with the New York Convention. Practice had clearly shown that in modern commerce, agreements were normally concluded orally or in a form did not meet the requirement of the written form as set forth in the New York Convention. The text should therefore offer an alternative proposal which did not require the written form.

51. Germany was among those countries which had no formal writing requirement for business arbitration agreements. It experienced problems only in connection with the New York Convention, because the form requirement in practice was not always in line with the Convention, in the eyes of foreign judges. His delegation would strongly recommend that the Commission should explore ways to amend the New York Convention.

The meeting was suspended at 11.50 a.m. and resumed at 12.30 p.m.

52. **Mr. Sekolec** (Secretary of the Commission) said that it would be useful to recall article V, paragraph 1 (a), of the New York Convention, according to which the law applicable to the arbitration agreement was, unless the parties agreed otherwise, that of the place where the award was made. Therefore, if the award was made in a State party to the New York Convention that had adopted the alternative version of article 7 as proposed in document A/CN.9/606, the law of that country would govern the validity of the arbitration agreement. If there was any doubt as to whether the country had adopted the alternative text, it would be possible to refer to article 7 of the New York Convention.

53. **Mr. Graham Tapia** (Mexico) endorsed the comments made by the representative of Switzerland regarding the potential problems arising from an arbitration agreement that was only in oral form. However, his delegation did not share the concern that the alternative proposal posed a problem with respect to the interpretation or application of article II of the New York Convention, and would be willing to accept the retention of that variant if there was a consensus in favour of such a decision.

54. **Mr. Özsunay** (Turkey) said that his delegation supported the adoption of the text as it stood, since the Arbitration Model Law addressed matters of concern not only to those countries in which arbitration was highly advanced but also to those in which it was still being developed.

55. **Ms. Perales Viscasillas** (Spain) said that her delegation supported the two variants as set out in document A/CN.9/606.

56. **Mr. Komarov** (Russian Federation) said that his delegation did not support the inclusion of the alternative proposal in the Arbitration Model Law, since, although there were precedents in other model documents issued by UNCITRAL in which variant texts were given, the existence of two alternatives in the Arbitration Model Law somewhat reduced the value of those recommendations and would be problematic for States wishing to adopt the Model Law. Furthermore, the alternative proposal had not received the same level of support as revised draft article 7 during the current discussions or those in the Working Group. Moreover, such support had been expressed primarily by representatives of States whose legal systems had already opted to dispense with the written form requirement, and it was therefore natural that they should favour the alternative proposal. However, such a liberal position regarding form reflected a high degree of arbitration culture. It would be more appropriate for those countries that had not yet attained such a level of development with respect to arbitration legislation and practice to make a more gradual

transition to a similarly liberal approach, guided by the revised draft article 7 of the Arbitration Model Law, whose provisions were already considerably broad and progressive. Notwithstanding those comments, he welcomed the progressive nature of the alternative proposal, which undoubtedly deserved to be reflected either in a footnote or in the explanatory material.

57. **Mr. Uzelac** (Croatia), endorsing the comments made by the representative of the Russian Federation, said that while the alternative proposal was valuable and should be retained in some form, possibly presented as an option available to those countries sufficiently advanced to adopt it, it was questionable whether it should be incorporated as a variant text of article 7, since the existence of variants, by creating uncertainty, made it more difficult for countries to adopt UNCITRAL model legislation. The Commission should seek another way in which to express support for full freedom of form.

58. **Mr. Boulet** (Belgium) said that his representatives shared the view expressed by the delegations of the Russian Federation and Croatia that the inclusion of two possible variants under article 7 should be avoided if possible, since such inclusion reflected that no actual choice had been made. The decision as to whether an arbitration agreement should be in written form was not simply a point of detail but a fundamental issue, particularly given that under article 8, parties that had concluded such an agreement only orally would be deprived of having recourse or access to a State tribunal. The Commission should adopt revised draft article 7 in order to retain the written form requirement while making that requirement more flexible, which would also ensure that article 7 was aligned with article II of the New York Convention. It could simply indicate in its report that certain States were in favour of dispensing with the requirement.

59. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that, while he shared the concerns expressed by previous speakers regarding the existence of alternatives in the Arbitration Model Law, the situation with respect to article 7 was peculiar in that many of those present, including himself, considered the alternative proposal to present a good solution that might be of use in the future, but for specific reasons were not prepared to adopt that solution in preference to revised draft article 7.

60. The general feeling within the Swiss arbitration community was that it would be desirable to dispense with the writing requirement, and his Association's initial decision to support the revised draft article had only been in the interest of ensuring that the provision was aligned with article II of the New York Convention. It was also important to consider that a number of countries had already adopted a solution along the lines of the alternative proposal, and that those countries were unlikely to review their position in favour of revised draft article 7; indeed, it would probably be undesirable for them to do so. Given that situation, it would be wrong to convey the impression that the Commission recommended the adoption of only one solution. His delegation therefore supported the proposal to present the two variants as options of equal value. However, the Commission might need to explain its reasons for doing so and offer guidance to States wishing to adopt the new provisions but uncertain as to how to choose between the two variants.

61. **Mr. Bellenger** (France) said that his delegation was not in favour of introducing the alternative proposal, since to do so would considerably weaken the value and scope of the provisions set out under revised draft article 7, which had been formulated with the aim of reflecting current arbitral practice as closely as possible.

62. **Mr. Sandoval López** (Chile) expressed support for the retention of the two variants.

63. **The Chairman** said that there appeared to be support for retaining the two variants of article 7 and for explaining that decision in the explanatory material, which should also offer appropriate guidance. Any further comments on the matter could be made at the next meeting.

Statement by the Under-Secretary-General for Legal Affairs, The Legal Counsel

64. **Mr. Michel** (Under-Secretary-General for Legal Affairs, The Legal Counsel) said that the modernization of commercial law was a prerequisite for the growth of trade and investment, which was in turn an indispensable factor in reducing poverty, increasing well-being and supporting social stability.

65. Commercial law reform was too often overlooked in the provision of development assistance, and yet it could fundamentally support sustained development

and post-conflict recovery. Internationally, it could facilitate cross-border projects and trade, and promote international and regional economic integration. In that context, the work of the Commission paved the way for international markets and removed the less visible barriers to international trade.

66. The two main topics on the agenda of the Commission's thirty-ninth session — secured transactions and international commercial arbitration — were prime examples of areas where effective reform and modernization were essential to creating new business opportunities and ensuring stability for existing business relations. A modern secured transactions regime was vital to encouraging the expansion of credit. An effective arbitration system was often the only viable way to ensure respect for contractual obligations, without which trade and investment could not prosper.

67. Because promoting a business-friendly environment and contract discipline was essential for the stability and prosperity of societies, aspects of the Commission's work might be incorporated into the activities of the recently established United Nations Peacebuilding Commission and of the United Nations Development Group, which was composed of the main United Nations development entities and sought to provide a system-wide forum for discussion of development issues.

68. In conclusion, he said that the work of the Commission on International Trade Law was integral to the broader context of the Organization's efforts to promote progress and the well-being of all peoples, particularly peoples in developing countries. Its efforts could ultimately have profound, far-reaching and positive economic and social consequences.

The meeting rose at 1 p.m.

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Thirty-ninth session

Summary record of the 826th meeting
Held at Headquarters, New York, on Wednesday, 28 June 2006, at 3 p.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

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This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within one week of the date of this document* to the Chief, Official Records Editing Section, room DC2-750, 2 United Nations Plaza.

Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

06-40895 (E)

The meeting was called to order at 3.20 p.m.

Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*continued*) (A/CN.9/589, 592, 605, 606, 607 and 609 and Add.1-6)

Amendment to article 35, paragraph 2, of the Arbitration Model Law

1. **The Chairman** invited the Commission to consider the amendment to article 35, paragraph 2 of the Arbitration Model Law, as proposed by the Working Group in document A/CN.9/606. The relevant comments were contained in paragraph 22.

2. **Mr. Graham Tapia** (Mexico) proposed that the word "certified" should be deleted in the second sentence of amended article 35, paragraph 2. The sentence would therefore read: "If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language." His delegation was proposing the deletion of the word "certified" because there had been cases where an application for enforcement of an award had been presented to a State court and the requirement to supply a certified translation had led to more controversy or litigation. His delegation was of the view that national procedural laws, rather than the Arbitration Model Law, should be applied in cases where a party alleged that the translation was not correct.

3. **Mr. Martens** (Germany) endorsed the Mexican proposal provided that the word "certified" was also deleted before the word "copy".

4. **Ms. Perales Viscasillas** (Spain) said that her delegation was in favour of amending article 35, paragraph 2, and that it supported the Mexican proposal. Unlike the original text, which provided that the party must supply a duly certified translation, the amended version left it to the discretion of the court whether or not to request a translation. It was therefore logical that the court should decide whether or not it wished that translation to be certified. Her delegation also supported the German proposal to delete the word "certified" before the word "copy", in the interests of flexibility. The certification requirement would become particularly problematic in cases where awards were issued electronically.

5. **Mr. Markus** (Switzerland) said that, while his delegation supported the Mexican and German proposals, it wished to avoid giving the impression that the judge did not have the possibility of requesting a certified copy of the award, if he or she doubted its authenticity. It might therefore be advisable to include a clarification of that point in the explanatory material.

6. **Mr. Möller** (Observer for Finland) said that his delegation was also in favour of amending paragraph 2 and supported the proposals to delete "certified" in front of "translation" and "copy", on the understanding that national courts had the authority to request certification if they deemed it necessary.

7. **Mr. Sandoval López** (Chile), supported by the representatives of Sweden and Qatar, endorsed the proposals to delete "certified" in front of "translation" and "copy".

8. **Mr. Castello** (United States of America) said that his delegation was in favour of deleting "certified" in both cases. However, because the original footnote to paragraph 2 provided that "the conditions set forth in this paragraph are intended to set maximum standards", the explanatory material should clearly state that individual judges had the authority to require certification if they doubted the authenticity of the award or the translation.

9. **The Chairman** said he took it that the Commission wished to adopt the amendment to article 35, paragraph 2, as set forth in document A/CN.9/606, with the deletion of the word "certified" before "copy" and "translation". He also took it that the Commission wished to clarify, in the explanatory material, that the judge had the authority to request certification under local law.

10. *It was so decided.*

Explanatory material

11. **The Chairman** invited the Commission to turn to paragraphs 23 and 24 of document A/CN.9/606, entitled "Explanatory material".

12. **Mr. Sorieul** (International Trade Law Division) said that paragraph 24 of document A/CN.9/606 dealt with the possibility of including in the Arbitration Model Law a provision along the lines of article 7 of

the United Nations Convention on Contracts for the International Sale of Goods, which was designed to facilitate interpretation by reference to internationally accepted principles. A similar provision had been included in the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Cross-Border Insolvency. The Commission should consider whether it wished to adopt such a provision and if so, whether it wished the provision to apply to the Arbitration Model Law as a whole or solely to chapter IV bis.

13. **The Chairman** suggested that article 3 of the Model Law on Electronic Commerce could serve as a model for the aforementioned provision, as it had done in the case of other UNCITRAL texts, including the Model Law on Cross-Border Insolvency. The text of article 3 could be found in footnote 29 of document A/CN.9/606.

14. **Ms. Perales Viscasillas** (Spain) pointed out that the provision contained in article 3 of the Model Law on Electronic Commerce had been copied verbatim in other international texts. Her delegation was of the view that it would be appropriate to introduce a similar provision in the Arbitration Model Law and to apply it to the entire Model Law.

15. **Mr. Komarov** (Russian Federation) said that that text should definitely be included. It was already part of many international instruments and would facilitate understanding of the uses to be made of the Model Law. Judges, using case on UNCITRAL texts (CLOUT), would be able to apply relevant national laws in a unified way.

16. **Mr. Rodríguez** (Paraguay) observed that the text had entered Organization of American States (OAS) legislation, as article 4 of the Inter-American Convention on the Law Applicable to International Contracts.

17. **The Chairman** said he would take it that the Commission wished to include the text reproduced in footnote 29 in the Arbitration Model Law, leaving it to the secretariat to determine the proper placement.

18. *It was so decided.*

19. **Mr. Sorieul** (International Trade Law Division), referring to the form and content of the explanatory material, as discussed in document A/CN.9/606, paragraph 23, said that the Working Group had initially suggested placing the explanatory material in an expanded version of an earlier explanatory note by the secretariat of no more than a dozen pages. That would mean covering amended articles 7 and 17 in two or three paragraphs at the most, which was probably too succinct. Others had suggested issuing the explanatory material as a guide supplementary to the Arbitration Model Law, as had been done in the case of later UNCITRAL model laws, thereby giving scope for more detailed information. The secretariat would appreciate the Commission's guidance as to format before it prepared the explanatory material, in consultation with experts, for submission to the Working Group or the Commission.

20. **The Chairman** said that the Commission's practice had evolved with regard to the inclusion of explanatory material. Initially, when the Arbitration Model Law had been adopted in 1985, the supplementary material had consisted of a brief commentary giving the legal background. Subsequently the secretariat had begun elaborating fuller explanatory notes for UNCITRAL instruments; and, as the problems States were experiencing in implementing model laws became more apparent, guides on enactment were developed for legislators, in which explanations for users were subsequently included.

21. The Working Group had thought it strange to issue such a guide to enactment and use in the case of the amendments to the Model Law and had decided rather that the secretariat should expand the original explanatory note to incorporate comments on the changes. However, since the Commission had now decided to add a great deal of explanatory information — which, if incorporated into the original explanatory note, would give disproportionate treatment to articles 7 and 17 — that decision should probably be reconsidered in favour of a guide.

22. **Mr. D'Allaire** (Canada) asked whether the guide would be prepared by the Working Group.

23. **Mr. Sekolec** (Secretary of the Commission) said that the amount of the Commission's input into the preparation of guides varied. In the present case, he believed that it was not worth convening the Working Group, since the secretariat should be able to prepare the necessary material in time for the following session.

24. A guide to enactment of the new provisions adopted could of course be prepared, but if it stood

alone, it would seem curious that no guidance was being given on the other provisions of the Model Law. By drawing on the original commentary on the 1984 draft model law, the secretariat would be able to prepare a unified, balanced text covering the whole Model Law.

25. **Mr. Sandoval López** (Chile) said that his delegation would opt for a guide that covered the entire Model Law.

26. **Ms. Illescas-Ortiz** (Spain) said that unless the new guide replaced the explanatory note, it would be best to add to the latter some short paragraphs about the new provisions and about the new guide to enactment.

27. **Mr. Chan** (Singapore) observed that the proposed guide would deal solely with the enactment of laws based on the new provisions. Another problem was that the Model Law was enacted differently depending on a country's legal system. The guide could be useful if it gave a practical compendium on how to use the Model Law, including for purposes of enactment. A new term to describe such a guide was needed.

28. **Mr. Sekolec** (Secretary of the Commission) said that it would strain the secretariat's resources to prepare a compendium of legislative history and practice, which would require the secretariat to embark on a long, expensive process involving, inter alia, many discussions with States. UNCITRAL usually limited itself to the history and purpose of the provisions of a model law and how they could be enacted.

29. **Mr. Castello** (United States of America) said that his delegation favoured the narrower project of a guide over the broader project of a compendium. A guide to enactment and use, covering the whole Model Law, and distilling the reasoning of the Working Group and the Commission behind the adoption of certain provisions, would be a very useful document. He suggested that once the secretariat had completed the project, it should submit a draft to the Working Group for review. Additional paragraphs regarding the amended articles should first be developed for inclusion in the explanatory note, and then the larger project on the guide could begin. He shared the Secretary's concerns regarding the Singaporean proposal. He would point out also that the purpose of a guide to enactment and use was to further the adoption of a model law and the harmonization of legislation and that that purpose would not be served by highlighting variations in State practice.

30. **The Chairman** said he took it that the Commission wished the secretariat to draft a guide to enactment and use of the Arbitration Model Law, for submission to the Commission at its next session.

31. *It was so decided.*

Draft declaration regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention

32. **Mr. Sekolec** (Secretary of the Commission) said that the draft declaration contained in document A/CN.9/607 had been under consideration by the Working Group for some time and discussed on various occasions. The draft declaration aimed at harmonizing the interpretation of the Convention. During the discussions questions had been raised as to whether it should be up to the Commission or the General Assembly to issue such a declaration, the role of the States parties to the Convention and other issues. It had been decided that it was the responsibility of the Commission to issue a statement to that effect. The basis for the mandate to do so was contained in General Assembly resolution 2205 (XXI) of 17 December 1966, which had established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade.

33. Some delegations had suggested that the word "declaration" should be replaced by the less forceful word "recommendation". It had also been suggested that a passage from the aforementioned resolution stating the Commission's mandate to promote and ensure a uniform interpretation of international treaties should be included in the text.

34. The title of the text would therefore read: "Recommendation regarding interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, adopted by the United Nations Commission on International Trade Law on 6 July 2006 at its thirty-ninth session". In preambular paragraph [1] of the text, after "law of international trade", the following words would be added: "by, inter alia, promoting ways and means of ensuring a uniform interpretation and

application of international conventions and uniform laws in the field of the law of international trade". As a consequential change, the following words should be deleted in paragraph 4: "by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade".

The meeting was suspended at 4.40 p.m. and resumed at 5.10 p.m.

35. **The Chairman** invited the Commission to consider the text contained in document A/CN.9/607, as amended.

36. **Mr. D'Allaire** (Canada) said that, as his delegation had had reservations about the use of the word "declaration", it welcomed the suggested change made by the secretariat. He would like further clarification on which body was issuing the recommendation and for whose benefit. More information was also needed on the role of the General Assembly with respect to that recommendation. The information provided by the secretariat seemed to suggest that the recommendation would be adopted by the Commission and transmitted to the General Assembly, which would subsequently take note of it.

37. **Mr. Sekolec** (Secretary of the Commission) said that the question of addressees had been discussed at an early stage of consideration of the text. The main addressees were not States; rather they were those who would be in a position of interpreting the New York Convention, including judges, arbitrators and the parties which would have to argue their case. Governments would also be included, because they were parties to the Convention. It had been decided that, as it would be difficult to enumerate all the addressees in the text, it would be preferable to refer to them in general terms. Concerning the role of the General Assembly, it should be borne in mind that UNCITRAL was the body which finalized and adopted the outcome of its work. Model laws were adopted by the Commission and bore its name. The General Assembly gave its endorsement of or appreciation for the action by the Commission, or recommended that Member States should enact its instruments. Such matters were the responsibility of the Sixth Committee for consideration and the General Assembly for adoption. The General Assembly might, for example, take note with appreciation that the Commission had modernized its model law and clarified some uncertainties concerning the relationship between the Arbitral Model Law and the New York Convention.

38. **Mr. Cachapuz de Medeiros** (Brazil) said that clarification was needed on the precise meaning and effects of the declaration. While the Convention had been produced by UNCITRAL, it now belonged to the States parties. Therefore, only the States parties could interpret it. The Commission could propose an amendment to the Convention or a new convention to replace the New York Convention. His delegation had doubts, however, as to whether the Commission could by itself interpret the Convention. The most that it could do was to suggest an interpretation to States.

39. **Mr. Markus** (Switzerland) said that his delegation welcomed the amendment suggested by the secretariat, which it considered to be important. It had shared the concerns of the representative of Brazil, but given that the text would be considered a recommendation by the Commission, and not by the General Assembly, his delegation no longer had concerns over its wording. The text, which was a guide to interpreting the Convention rationally, was not intended to be an authoritative text. Otherwise, it might be taken that the Commission, or indeed the General Assembly, was attempting to alter an international convention. It was up to Member States to make any changes through a formal process. In conclusion, his delegation was entirely satisfied with the text, as amended. Furthermore, the text was in keeping with the tradition of previous Commission decisions on model laws, which constituted a digest to guide practitioners in the best ways of interpreting the text of a given model law.

40. **Mr. Möller** (Observer for Finland) said that his delegation had been critical of such declarations, because it was up to the courts to apply the Convention. It had also been unclear whether in instances where there was case law concerning article II such a declaration would have much effect. The word "recommendation" was less aggressive than "declaration" and therefore more in keeping with the nature of the document.

41. **The Chairman** said he took it that the Commission wished to adopt the title and paragraphs [1] to [3] of the draft contained in document A/CN.9/607, paragraph 4, as amended.

42. *It was so decided.*

43. **Mr. Dervaird** (United Kingdom) said that in the light of the proposed amendment to paragraph [1] there was no longer any need for paragraph 4.

44. **The Chairman** said that, if there was no objection, he would take it that the Commission wished to delete paragraph [4].

45. *It was so decided.*

46. **The Chairman** said that, if there was no objection, he would take it that the Commission wished to adopt paragraphs [5] to [10].

47. *It was so decided.*

48. **Mr. Castello** (United States of America), with respect to paragraph 11, said that as case law was not usually referred to as being enacted the word "including" before the phrase "case law" should be replaced by "as well as".

49. **The Chairman** said that, if there was no objection, he would take it that the Commission wished to adopt paragraph [11], as amended, paragraphs 12 to 14, and the entire text of the draft recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention, as amended.

50. *It was so decided.*

The meeting rose at 5.35 p.m.